(16,303.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 180.

JULIUS A. BELEY, F. DARLING, AND CHARLES DRIGARD, PLAINTIFFS IN ERROR,

vs.

JOSEPH NAPHTALY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY, FREDERICK DARLING, RICHARD DOE, JOHN ROE, Richard Roe, John White, Richard White, John Black, Richard Black, John Brown, Richard Brown, John Green, Richard Green, George Green, Charles Green, George Black, Jane Doe, Jane Roe, Jane Black, Jane White, Jane Brown, Defendants.

Amended Complaint.

The said plaintiff, Joseph Naphtaly, of the city and county of San Francisco, State of California, and a citizen of said State, for his amended complaint herein, complains of said defendants, and for cause of action alleges:

I.

That heretofore, to wit, on the 1st day of October, 1893, the said plaintiff was, and ever since has been, and now is, the owner in fee and entitled to the possession of all those certain tracts of land situated in the county of Contra Costa, State of California, and
2 particularly described on a plat of the survey made by the surveyor general of the United States for the district of California, and which was filed in the land office of the United States for the San Francisco district, on Nov. 3d, 1893, as lots Nos. three (3), six (6), seven (7), eight (8), nine (9), and twelve (12); the northeast quarter of the southwest quarter; the east half of the northwest quarter; the southeast quarter of the southeast quarter; the north half of the southeast quarter, and the northeast quarter of section ten (10), lot one (1) and the southwest quarter of the southwest quarter of section two (2), lots one (1), two (2), three (3), four (4), five (5), and six; the southeast quarter of the southwest quarter, the northeast quarter of the southeast quarter, and the south half of the southeast quarter of section three (3); the west half of section eleven (11), township one (1), south range two (2) west, Mount Diablo base and meridian.

II.

That afterwards and while the plaintiff was the owner in fee and entitled to the possession of said tract of land as aforesaid, said defendants wrongfully entered upon the same and ousted and ejected the plaintiff therefrom, and from the whole thereof; and *and* from thence to the present time, have wrongfully withheld the possession thereof from the plaintiff, to his damage in the sum of one thousand dollars.

III.

That the value of the said tract of land exceeds the sum of two thousand dollars, and that the matter in dispute in this action, ex-

clusive of interest and costs, exceeds the sum of two thousand dollars.

3 IV.

That the title of plaintiff to all of said tract of land, and his right to the possession thereof, accrued to and vested in him under and by virtue of patents therefor, which were duly and regularly issued to him by the United States in the year 1893, under and in pursuance of the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," and the acts supplemental thereto, and the provisions of section 7 of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California;" that the defendants and each of them deny the validity of said patents, and each of them; they and each of them allege that the plaintiff purchased the said lands and premises in the said patents mentioned and described, from the assignee of the grantees of an alleged Mexican grant, after the final rejection of the said alleged grant by the Supreme Court of the United States, and with full knowledge of the same; they and each of them allege, that the plaintiff purchased the said lands and premises from a person who obtained the same from an assignee of the grantees of an alleged Mixican grant by deed of gift; they and each of them allege that the plaintiff claims to have purchased the said lands and premises from the assignee of persons who claimed to have a final and complete grant from the then Mexican governor of the State of California, but the said defendants and each of them allege that no such grant was ever issued to the said alleged grantees; therefore, for and on account of the matters and things

4 aforesaid, they and each of them deny that the plaintiff is or was a purchaser in good faith and for a valuable consideration, of the said lands or any part thereof, within the true intent, construction, and meaning of the said section 7 of the act of Congress of July 23, 1866; they and each of them deny that the plaintiff purchased the said lands from Mexican grantees, or their assigns; they, and each of them, deny that the said lands so purchased by the plaintiff and conveyed to him by the United States by said patents, ever were part or parcel of any Mexican grant, genuine, or supposed to be genuine; they, and each of them, deny that the plaintiff or his predecessors, or grantors, ever used or improved or continued in the possession of the said lands or any part thereof, according to the lines of his or their alleged original purchase of the said lands, described and conveyed in and by the said patents to the plaintiff; they, and each of them, deny that no valid right or title adverse to the plaintiff existed at and prior to the settlement and purchase of the said lands and premises, and the proceedings terminating in the issuance of said patents, but, on the contrary, they, and each of them, allege and aver that they and their ancestors, predecessors and grantors, had a valid adverse right and title to the said lands and premises, conveyed by said patents so issued to the plaintiff; they, and each — them, deny that under the statutes, or any statute, the officers of the United States had any

right or power to issue the said patents, or either of them, to the plaintiff; they, and each of them, deny that said patents, or either of them, conveyed or conveys unto the plaintiff, any estate, right, title or interest in or to said lands, or any part thereof.

V*I*.

That the value of the rents, issues and profits of said tract of land is the sum of two thousand dollars per annum.

VI.

That the true names of said defendants sued herein by the names of John Doe, Richard Doe, John Roe, Richard Roe, John White, Richard White, John Black, Richard Black, John Brown, Richard Brown, John Green, Richard Green, George Green, Charles Green, George Black, Jane Doe, Jane Roe, Jane Black, Jane White and Jane Brown are unknown to plaintiff, and he therefore prays that when their true names are discovered, they be inserted herein and in all subsequent pleadings, papers and records in this action, in the place of said fictitious names.

Wherefore, said plaintiff prays for judgment against said defendants for the possession of all of said tract of land, and for the sum of one thousand dollars ($1,000) damages as aforesaid, and for the sum of two thousand dollars ($2,000) for the value of the rents, issues and profits of said lands as aforesaid, and for costs of suit.

NAPHTALY, FREIDENRICH & ACKERMAN,
Attorneys for Plaintiff.

CRITTENDEN THORNTON, Esq., *Of Counsel.*

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Joseph Naphtaly, being duly sworn, deposes and says, that he is the plaintiff in said action; that he has heard read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he verily believes it to be true.

J. NAPHTALY.

Subscribed and sworn to before me, this 15th day of June, 1894.
[SEAL.] GEO. T. KNOX,
Notary Public.

(Endorsed:) Service of a copy of the within answer admitted this 15th day of June, 1894. Earl H. Webb, attorney for def't. Filed June 15, 1894. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

The following is endorsed on the foregoing amended complaint: The default of the within-named defendant, Richard Roe, whose true name is Chas. Brigard, entered upon minutes of court January 24, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

7 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, FREDERICK DARLING, Defendants.

Answer of Julius A. Beley to Amended Complaint.

Now comes the defendant, Julius A. Beley, and for answer to the amended complaint herein, answers for himself and says:

I.

That he denies that heretofore, to wit, on the 1st day of October, 1893, or at any other time, plaintiff was, or ever since has been, or now is, the owner in fee or otherwise, or entitled to the possession of those certain tracks of land situated in the county of Contra Costa, State of California, or particularly described on a plat of the survey made by the surveyor general of the United States, for the district of California, or any other United States surveyor for said State, filed in the land office of the United States for the San Francisco land district, on November 3rd, 1893, or at any other time, described as Nos. three (3), six (6), seven (7), eight (8), nine (9), and twelve (12); the northeast quarter of the southwest quarter; the east half of the northwest quarter; the southeast quarter of
8 the southeast quarter; the north half of the southeast quarter of section ten (10), lot one (1), and the southwest quarter of the southwest quarter of section two (2), lots one (1), two (2), three (3), four (4), five (5), or six (6), or the southeast quarter of the southwest quarter or the northeast quarter of the southeast quarter; or the south half of the southeast quarter of section three (3); or the west half of section eleven (11), township one (1) south, range two (2) west, Mount Diablo meridian.

II.

Defendant denies that the plaintiff was or is the owner in fee, or otherwise, or that he is entitled to the possession of said tract of land, hereinbefore described, or any part thereof. Denies that he ever wrongfully entered upon the same, or ejected the plaintiff therefrom, or from any part or parcel thereof. Denies that he at any time wrongfully withheld the possession thereof from the plaintiff or any part of the same, to plaintiff's damage in the sum of one thousand dollars or in any other sum whatever.

III.

Defendant admits that the value of said described tract of land exceeds the sum of two thousand dollars, and that the matter in dispute in this action, exclusive of interest and costs, exceeds the sum of two thousand dollars.

IV.

That in answer to the fourth paragraph of said complaint, defendant denies that the title to all or any part of said de-
9 scribed land, or plaintiff's right to the possession thereof, vested in him under or by virtue of patents therefor, duly or regularly issued to said plaintiff by the United States in the year 1893, under or in pursuance of the provisions of the act of Congress of the 24th of April, 1820, entitled "an act making further provisions for the sale of public lands," or the acts supplemental thereto, or under the provisions of section seven of the act of Congress of July 23rd, 1866, entitled, "An act to quiet land titles in the State of California," or under the provisions of any other act of Congress providing for the issue of patents for said described tract of land, or any part thereof.

V.

That it does not appear from paragraph four of said complaint, or any part of said complaint, the statement of any fact or facts sufficient in law to show that this honorable court has any jurisdiction over said cause of action and does not state wherein or how said cause of action arises under the Constitution or laws of the United States.

VI.

That as to the allegation in said plaintiff's complaint, in paragraph four thereof, that the value of rents, issues, or profits of said tract of land *in* the sum of two thousand dollars per annum, defendant has no information or belief upon the subject sufficient to answer the allegation and upon that ground denies the same.

VII.

Defendant for a further answer to plaintiff's complaint
10 says: That he disclaims any right, title, or right of possession to any of said described land except that portion known and described as the northeast quarter of section ten (10), township one (1) south, range two (2) west, Mount Diablo base and meridian, containing 160 acres more or less.

Wherefore, defendant demands for judgment that said action be dismissed against the defendant, Julius A. Beley, and for costs of suit.

EARL H. WEBB,
Att'y for Def't Beley.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, } ss:

Julius A. Beley, being duly sworn, says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated

on his information and belief, and as to these matters he believes it to be true.

JULIUS A. BELEY.

Subscribed and sworn to before me this 20th day of June, 1894.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

(Endorsed :) Service by copy of the within admitted this 20th day of June, 1894. Naphtaly, Freidenrich & Ackerman, att'ys for pl'ff. Filed June 20th, 1894. W. J. Costigan, clerk.

11 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, FREDERICK DARLING, Defendants.

Answer of Frederick Darling to Amended Complaint.

Now comes the said Frederick Darling for himself and for answer to the plaintiff's amended complaint herein, says: That on the 3rd day of March, 1894, at the county of Contra Costa, in said State of California, he was personally served with a summons and a copy of the complaint herein and designated therein under a fictitious name.

I.

Defendant denies that heretofore, to wit, on the 1st day of October, 1893, or at any other time, plaintiff was or ever since has been, or now is, the owner in fee, or otherwise, or entitled to the possession of those certain tracts of land situated in the county of Contra Costa, State of California, *or* particularly described on a plat of the survey made by the surveyor general of the United States for the district of California, or any other United States surveyor for said State, filed in the land office of the United States for the San Francisco land district, on November 3rd, 1893, or at any other time

12 described as Nos. three (3), six (6), seven (7), eight (8), nine (9) and twelve (12); the northeast quarter of the southwest quarter; the east half of the northwest quarter; the southeast quarter of the southeast quarter; the north half of the southeast quarter of section ten (10), lot one (1), and the southwest quarter of the southwest quarter of section two (2); lots one (1), two (2), three (3), four (4), five (5) or six (6), or the southeast quarter of the southwest quarter, or the northeast quarter of the southeast quarter; or the south half of the southeast quarter of section three (3); or the west half of section eleven (11), township one (1) south, range two (2) west, Mount Diablo meridian.

II.

Defendant denies that the plaintiff was or is the owner in fee or otherwise, or that he is entitled to the possession of said tract of land hereinbefore described, or any part thereof. Denies that he ever wrongfully entered upon the same, or ejected the plaintiff therefrom, or from any part or parcel thereof. Denies that he, at any time, wrongfully withheld the possession thereof from the plaintiff, or any part of the same to plaintiff's damage in the sum of one thousand dollars, or in any other sum whatever.

III.

Defendant admits that the value of said described tract of land exceeds the sum of two thousand dollars, and that the matter in dispute in this action, exclusive of interest and costs, exceeds the sum of two thousand dollars.

13 IV.

That in answer to the fourth paragraph of said complaint, defendant denies that the title to all, or any part, of said described land, or plaintiff's right to the possession thereof vested in him under or by virtue of patents therefor, duly or regularly issued to said plaintiff by the United States in the year 1893, under or in pursuance of the provision of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of public lands or the acts supplemental thereto, or under the provisions of section 7 of the act of Congress of July 23d, 1866, entitled 'An act to quiet land titles in the State of California,'" or under the provisions of any other act of Congress providing for the issue of patents for said described tract of land, or any part thereof.

V.

That it does not appear from paragraph four of said complaint, or any part of said complaint, the statement of any fact or facts sufficient in law to show that this honorable court has any jurisdiction over said cause of action and does not state wherein or how said cause of action arises under the Constitution or laws of the United States.

VI.

That as to the allegation in said plaintiff's complaint in paragraph IV thereof, that the value of the rents, issues, or profits of said tract of land is the sum of two thousand dollars per annum defendant has no information or belief upon the subject sufficient to answer the allegation, and, upon that ground, denies the same.

14

VII.

Defendant for a further answer to plaintiff's complaint says: That he disclaims any right, title or right of possession to any of said described land except that portion known and described as lots one (1), two (2) and three (3), and the southwest quarter of section three

(3), Mound Diablo meridian, containing one hundred and sixty acres of land, or thereabouts.

Wherefore, defendant demands for judgment that said action be dismissed against the defendant, Frederick Darling, and for costs of suit.

PHILIP TEARE,
Attorney for Defendant Darling.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, } ss:

Frederick Darling being duly sworn, says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge except as to the matters therein stated on his information and belief; and as to those matters, he believes it to be true.

F. DARLING.

Subscribed and sworn to before me this 20th day of June, 1894.
W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

15 (Endorsed:) Service by copy of the within admitted this 20th day of June, 1894. Naphtaly, Freidenrich & Ackerman, att'ys for pl'ff. Filed June 20th, 1894. W. J. Costigan, clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY and F. DARLING, Defendants. } No. 11900.

Judgment.

This cause having heretofore come on to be heard before the Honorable Joseph McKenna, judge of the above-entitled court, sitting without a jury, a jury having been waived by the stipulation of the parties in writing, made and filed in open court, A. L. Rhodes, Esq., and Crittenden Thornton, Esq., appearing for the plaintiff, and Philip Teare, Esq., and H. F. Crane, Esq, appearing for the defendants; and all and singular the evidence and testimony being seen, heard and duly considered, and the court having heretofore announced its decision in favor of the plaintiff—

And the parties hereto having, in writing, waived findings herein—

16 And it further appearing to the court that Charles Brigard, sued herein as Richard Roe, was duly served with summons and complaint herein, and that he has failed to appear within the

time required by law, and that his default for failure to plead herein has been duly entered:

It is now by the court ordered, adjudged and decreed, that the plaintiff herein do have and recover from Julius A. Beley, F. Darling and Charles Brigard, defendants herein, all those certain tracts of land situated in the county of Contra Costa, State of California, and particularly described on a plat of the survey made by the surveyor general of the United States for the district of California, filed in the land office of the United States for the San Francisco district, on November 3d, 1893, as lots Nos. three (3), six (6), seven (7), eight (8), nine (9) and twelve (12); the northeast quarter of the southwest quarter; the east half of the northwest quarter; the southeast quarter of the southeast quarter; the north half of the southeast quarter, and the northeast quarter of section ten (10), lot one (1) and the southwest quarter of the southwest quarter of section two (2), lots one (1), two (2), three (3), four (4), five (5) and six (6); the southeast quarter of the southwest quarter, the northeast quarter of the southeast quarter, and the south half of the southeast quarter of section three (3); the west half of section eleven (11), township one (1) south, range two (2) west, Mount Diablo base and meridian.

That the plaintiff likewise have and recover of said defend-
17 ants his costs in this action, and that execution issue for the possession of said lands and premises, and the said costs, under the seal of this court.

Dated February 21st, 1895.

JOSEPH McKENNA,
Circuit Judge.

(Endorsed:) Filed and entered February 21st, 1895. W. J. Costigan, clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, Defendants. } No. 11900.

Notice of Motion for New Trial.

You will please take notice that on Friday, the 15th day of February, 1895, at 11 o'clock a. m. on that day, or on such day thereafter as said motion can be heard, the defendants will move said court to set aside the judgment made and rendered herein on the 23rd day of January, 1895, and grant a new trial in this cause.

That said motion will be based upon the following grounds, to wit:

That the court erred in sustaining the plaintiff's objection to the following evidence offered by the defendants for the purpose of showing the invalidity of the patents put in evidence by the plaintiff, to wit:

18 First. The application of the plaintiff to purchase the lands in question from the United States, filed August 10th, 1883, in the United States Land Office.

Second. Record of the Romero claim as it appears from the archives of the Mexican government on file in the office of the surveyor general in San Francisco.

Third. Decree and proceedings of board of land commissioners concerning said Romero claim, dated April 17th, 1855.

Fourth. Opinion and decree of United States district court in the matter of Romero claim, dated 5th day of October, 1857.

Fifth. Opinion and decree of Supreme Court of United States on said claim in December term, 1863.

Sixth. Decision of Hon. Wm. A. J. Sparks, Commissioner of General Land Office of the United States, dated March 2nd, 1887, rejecting the application of the plaintiff to purchase said land.

Seventh. Decision of Hon. W. F. Vilas, Secretary of the Interior of the United States, dated February 4th, 1889, affirming the decision of said Commissioner and denying the application of the plaintiff to purchase said land.

Eighth. Decision of Hon. Geo. Chandler, acting Secretary of the Interior, dated June 23rd, 1891, granting a review and rehearing of said application of plaintiff.

Ninth. Decision of Hon. John W. Noble, Secretary of the Interior, dated May 18th, 1892, allowing said application of plaintiff to purchase said land.

That said motion will be made upon a bill of exceptions
19 by the defendant- to be hereafter allowed and settled. And upon the pleadings and files in said cause.

Dated Jan'y 31st, 1895.

HENRY F. CRANE AND
PHILIP TEARE,
Att'ys for Def't.

(Endorsed:) Service of a copy of the within notice admitted this 31st day of Jan'y, 1895. Naphtaly, Freidenrich & Ackerman, att'ys for pl'ff. Filed Feb. 1st, 1895. W. J. Costigan, clerk, by W. B. Beaizley, dep. clerk.

At a stated term, to wit, the February term, A. D. 1895, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 25th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge.

JOS. NAPHTALY
vs.
J. A. BELEY *et al.* } 11900.

Order Denying Motion for New Trial.

By consent of counsel, the motion for a new trial pending herein was submitted to the court without argument and ordered denied.

20 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, Defendants.

Bill of Exceptions.

Be it remembered that on the 27th day of June, 1894, the above cause came on regularly for trial before the court sitting without a jury, a jury having been waived by the parties hereto, whereupon the following proceedings were had, to wit:

The plaintiff to maintain the issues on his behalf introduced and put in evidence two certain patents purporting to have issued to him from the United States for the land described in the complaint, which patents are in the words and figures as follows, viz:

"THE UNITED STATES OF AMERICA.

"Certified No. 18964.

"To all to whom these presents shall come, Greeting:

"Whereas, Joseph Naphtaly, of San Francisco county, California, has deposited in the General Land Office of the United States, a certificate of the register of the land office at San Francisco, California, whereby it appears that full payment has been made
21 by the said Joseph Naphtaly according to the provisions of the act of Congress of the 24th of April, 1820, entitled 'An act making further provisions for the sale of the public lands' and the acts supplemental thereto for the lot numbered one and the southwest quarter of the southwest quarter of section two and the lots numbered one, two, three, four, five and six, the southeast quarter of the southwest quarter, the northeast quarter of the southeast quarter, and the south half of the southeast quarter of section three, in township one south, of range two west, of Mount Diablo meridian in California, containing three hundred and seventy-one acres and forty-hundredths of an acre according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Joseph Naphtaly.

Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Con-

gress, in such case made and provided, *have given and granted* and by these presents *do give and grant* unto the said Joseph Naphtaly, and to his heirs the said tract above described, *to have and to hold* the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said Joseph Naphtaly and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts and also subject to the right of the proprietor of a
22 vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the 28th day of February, in the year of our Lord, one thousand eight hundred and ninety-three, and the Independence of the United States, the one hundred and seventeenth.

(Seal of General Land Office United States.)

By the President:

BENJAMIN HARRISON,
By E. MACFARLAND,
Assistant Secretary.
D. P. ROBERTS,
Recorder of the General Land Office."

Recorded vol. 31 A, page 261.

The other patent is in form, terms and substance the same as the foregoing, except that the latter calls for other land, which is designated and described as follows, viz:

"Lot numbered six of section nine, and the lots numbered three, six, seven, eight, nine and twelve, the northeast quarter of the southwest quarter, the east half of the northwest quarter, the southeast quarter of the southeast quarter, the north half of the
23 southeast quarter, and the northeast quarter of section ten, in township one, south range two west, of Mount Diablo meridian, in California, containing five hundred and sixty-six acres and sixteen-hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general."

The plaintiff then proved that while he was in the peaceable and quiet possession of the lands described in the complaint, the defendants, Beley, Darling and others, entered upon the said lands and ousted plaintiff therefrom and have ever since detained said lands from the plaintiff, as alleged in the complaint herein.

The plaintiff also proved the rental value of said land.

It was then admitted by the defendants' counsel that at the time of the issuance of the patents hereinbefore described the lands therein, and in the complaint described, were public lands of the United States, subject to sale under the laws of the United States. It was here conceded by defendants' counsel that defendants did not propose to connect themselves in any manner or form with the title of the United States to the premises described in the complaint herein, or any part thereof, either by certificate of purchase, patent, or anything of the kind.

The plaintiff then rested.

The defendants then offered in evidence the following documents:

First. The application of the plaintiff, Naphtaly, to purchase said land from the United States, which is in words and figures as follows, viz:

24 UNITED STATES LAND OFFICE,
San Francisco, California.

"To the register and receiver:

I, Joseph Naphtaly, a citizen of the United States of America, and a resident of the city and county of San Francisco, State of California, do hereby apply to purchase from the Government of the United States of America, under and in pursuance of section seven of an act of Congress entitled 'An act to quiet land titles in California,' approved July 23rd, 1866, the following pieces and parcels of land, to wit: Lots 4, 5, 6 and 7 (four, five, six and seven) of section —, T. 1 N., R. 2 W. Also all of fractional sections 2 and 3, lots 3, 4, 5, 6, 9, and the E. ½ of S. E. ¼ of sec. 4; the N. E. ¼ of N. E. ¼ of sec. 9; all of section ten; all of fractional section eleven: all of fractional section twelve; lots 1 and 2, and the W. ½ of S. W. ¼ of sec. 13; all of section 14; all of sec. 15; the N. ½ of N. E. ¼ and N. E. ¼ of N. E. ¼ of section 22; the N. ½ of N. W. ¼ and N. W. ¼ of N. E. ¼ of section 23, in township 1 south, of range two west, Mount Diablo meridian, and I beg leave to refer to the diagram hereto annexed, marked Exhibit 'A,' which shows the said parcels of land as claimed and occupied by me and my grantors, and included within the red-inked fence line.

In support of my said application I do hereby allege that said land was included within the exterior boundaries and *formed part of a grant made by the Mexican government* in the year 1844 to the three brothers Romero, viz: Inocencia Romero, Jose Romero
25 and Mariano Romero; that said brothers Romero presented their claim for certain lands which included the lands hereinbefore particularly described to the board of U. S. land commissioners to ascertain and settle private land claims in the State of California, that said board rejected said claim, and on appeal to the Supreme Court of the United States said claim was finally rejected in the year 1863. That in the year 1846 or 1847 the Romero brothers made a division of the lands claimed by them under the

grant aforesaid, Inocencia Romero taking the lands embraced within the enclosure delineated on said diagram, and said Inocencia used and cultivated said lands until the 26th of December, 1853, when he, for a valuable consideration to him paid, sold and conveyed said land and the possession thereof to Domingo Jujol and Francisco Sanjurjo, who entered upon the possession of said land embraced within said enclosure and used, improved, and continued in the actual possession thereof as according to the lines of their original purchase until February 14th, 1855, when said Jujol, and Sanjurjo, for a valuable consideration, sold and conveyed said tract of land and transferred the possession thereof to one J. W. Tice, who entered upon the possession thereof, used, improved, and cultivated and continued in the actual possession thereof until August 8th, 1855, when he, for a valuable consideration, sold and conveyed said tract of land, and transferred the possession thereof to A. J. Tice, who then entered into the possession of said land and used, and cultivated, and improved, and continued in the possession thereof until October 17th, 1859, when he conveyed said tract of
26 land and transferred the possession thereof to one S. P. Millett. That said Millett then entered into the possession of said land, used, improved and cultivated the same and continued in the actual possession thereof according to the lines of the original purchase. That in 1868 he made a conveyance thereof to D. P. Smith, who made a conveyance thereof to one J. R. Spring in February, 1869, and who made a conveyance thereof to Martin Clark in March, 1869, who *in* May 15th, 1876, made a conveyance thereof to this applicant.

That said conveyance to said D. P. Smith was made as this applicant is informed and believes for the benefit of said S. P. Millett and the conveyances to Spring and Clark were made for the benefit of this applicant who entered in the exclusive possession of said land in September, 1873, and has used, improved and continued in the actual possession of the same as according to the lines of the original purchase made by Pujol and Sanjurjo from said Romero as I am informed and believe to be true.

That I am, and my grantors and predecessors in interest have been, as I am informed and believe, in the actual and continued possession of said parcel of land, ever since the year 1847, according to the lines of their original purchase, made as aforesaid, which lands are designated as near as may be on the enclosed map.
27 That on the 23rd day of July, 1866, there was no adverse claim by any person for said land or any part thereof. That the same is not mineral land, and has not been reserved by the United States for any purpose whatsoever.

JOSEPH NAPHTALY, *Applicant.*

(Here follows map marked p. 27*a*.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Joseph Naphtaly, being duly sworn, deposes and says, that he is made the above-named applicant, that he has made the foregoing petition and application and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

JOSEPH NAPHTALY.

Subscribed and sworn to before me, on this 10th day of August, 1883.

WM. R. WHEATON, *Registrar.*

(Endorsed:) Filed August 10th, 1883. Wm. R. Wheaton, registrar."

Second. The defendants then offered in evidence the record of the Romero claim as it appears by the archives of the Mexican government now kept in the office of the surveyor general of the United States, at San Francisco, which is in words and figures as follows, to wit:

"YOUR EXCELLENCY:

The citizens Inocente, Jose and Mariano Romero, brothers, natives of this department before the righteous equity of Y. E., with due respect and according to law, state—

28 That last year we forwarded to Y. E. a petition soliciting a tract which is unoccupied in the neighborhood of the rancho of the Senor Don Joaquin Moraga, Don Lorenzo Pacheco and Julian Wil, being a remainder and over and above what belongs to the owner of said ranchos, and as said petition has been mislaid, we present ourselves anew to Your Excellency, hoping from your refined goodness and equity that you will please to decree in our favor, in case our request does not infringe upon the private property of any individual.

Wherefore, we humbly solicit and pray Y. E. to accede to our petition, whereof we will ever feel grateful, and we make oath that we do not proceed through malice, adding all other requisite verification, &c.

Monterey, January 18th, 1844.

INOCENTIO ROMERO.
JOSE ROMERO.
MARIANO ROMERO.

MONTEREY, *January 18th*, 1844.

Let the honl. sety. of state report having first taken such steps as he may deem necessary.

MICHELTORENA.

His E., the governor, decrees that the first alcalde of the town of San Jose report upon the contents of the foregoing petition, summoning the Senor Moraga, Pacheco and Wil, so that they may allege whatever cause they may deem proper, and all being concluded, let the papers be returned to this office.

Monterey, Jan., 1844.

MANUEL JIMENO.

29 The petitioners in this case and the owners—owners of lands bounded by the track which is claimed having been confronted, the latter said that they, Senoras Romero, did not prejudice them in any way, but, on the contrary, that they desired them to be their neighbors, both for company and for the additional security of their families in that region; it has also come to the knowledge of this tribunal that one Francisco Soto claimed the tract in question some six or seven years ago, but in this time he has neither used nor cultivated it in any way to give any right thereto. Wherefore, the petitioners appears to me entitled to the favor they ask.

ANTONIO MA. PICO.

Town of San Jose Guadalupe, Feb'y 1, 1844.

YOUR EXCELLENCY:

According to the report of the 1st alcalde of San Jose—after summons to the owners of the ranchos that bound the tract in question, and as to the good character of the claiming parties—it would seem that there is no obstacle to making the grant they claim, if Your Excellency approve of it.

MAN'L JIMENO.

MONTEREY, *Feb'y 14th*, 1844.

Let the judge of the proper district take measurement of the unoccupied land that is claimed in the presence of the neighbors, and certify the result so that it may be granted.

MICHELTORENA.

30 YOUR EXCELLENCY:

The citizens Inocencio, Mariano and Jose Romero, residents of this district, before the equity of Y. E., with due respect and to the full intent of the law, do set forth that we appeared before his honor, the judge of the pueblo of San Jose, to obtain that he should proceed to the measurement of the tract of land which we have solicited, according to the tenor of Y. E. decree of the 4th ulto., but that he was unable to execute that superior order, for the reason that the owners of the neighboring land whom we indicated were absent and engaged, and as it will happen Y. E. that these individuals will not meet very soon, for one or other of the two said causes, we see ourselves in the necessity of soliciting Y. E. to do us the favor of granting to us the said tract, either provisionally or in such a manner as Your Excellency shall deem fit, so that we may

(while it is yet time) commence our planting and other works; since the owners of the neighboring lands are satisfied with the boundaries we state and desirous of having us for neighbors, as appears from the report of the judge aforementioned and that of the honl. sety. of state enclosed in the official document, which we duly enclose to Your Excellency, together with the petition which contains the result to which we limit ourselves.

Wherefore, we solicit Your Excellency to accede to our request, thus conferring favor and justice; and we make oath according to law."

INOCENCIO ROMERO.
MARIANO ROMERO.
JOSE ROMERO.

Monterey, March 21st, 1844.

31 "YOUR EXCELLENCY:

"I think that Y. E.'s order should be carried into effect in regard to the measuring of the land that is claimed, and as soon as this is accomplished with the least practicable delay, Senor Romero can present himself, joined with Senor Soto, who says that he has a right to the same tract—your excellency's superior discernment will determine what is best.

"Monterey, March 23d, 1844.

"MANUEL JIMENO.

"MONTEREY, *March* 23*d*, 1844.

"Let everything be done agreeably to the foregoing report.

"MICHELTORENA."

Third. The defendants next offered in evidence the opinion and decree of the board of land commissioners in the matter of said Romero claim, which is in words and figures as follows, to wit:

"INOCENCIO ROMERO *et al.*
vs.
THE UNITED STATES. } No. 654.

Lands in Contra Costa county.

In this case the petitioners have placed on file copies of an expediente and proceedings preliminary to the issue of a grant for a surplus of several claims therein named.

The first expediente dated the 18th of January, 1844, and a correspondence kept up on the subject with the several departments of state to the year A. D. 1849.

32 But it does not appear that any grant was ever issued to any person and no equitable right appears on the part of any of the petitioners to a confirmation.

We are of the opinion that the claim is invalid and the decree will be entered adverse to the petitioners.

Rejected. Filed in office April 17th, 1855.

GEORGE FISHER, *Sec.*

(Marginal entry:) *Opinion by Com'r Farwell.*

(Title of case same as above.)

In this case, after hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioners is not valid, it is therefore decreed that the application for a confirmation thereof be denied.

R. AUG. THOMPSON,
L. B. FARWELL,
Commissioners.

Filed in office April 17th, 1855.

GEORGE FISHER, *Sec.*"

Fourth. The defendants also offered in evidence the opinion and decision of the United States district court in said Romero case made on or about October 5th, 1857, and reported in full in 1st Hoffman's Reports, page 219, entitled United States *vs.* Remero *et al.*

That said opinion and decision may be read, used and considered for all purposes herein with the same force and effect as if it had been copied and inserted in full in this bill of exceptions.

Fifth. The defendants also offered in evidence the opinion and decision of the Supreme Court of the United States, made in
33 said Romero case in the December term, 1863, and reported in full in vol. 1st, Wallace Reports, p. 721.

That said opinion and decision may be read, used and considered herein for all purposes, and with the like force and effect as though the same had been inserted in full in this bill of exceptions.

Sixth. The defendants further offered in evidence the decision and opinion of Wm. A. J. Sparks, Commissioner of the General Land Office, upon the application of the plaintiff to purchase said land of the United States.

The following is a portion of said opinion and decision:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *March 2d*, 1887.

"Register and receiver, San Francisco, Cala.

"GENTLEMEN: I have examined the contested case on appeal of Joseph Naphtaly *vs.* L. L. Bregard *et al.*, forwarded with your letter of February 26th, 1885, and involving rights to lands in township 1 north, range two west, and one south two west, M. D. M. The record status of the case is as follows: Joseph Naphtaly filed appli-

cation No. 95, August, 1883, to purchase under the 7th sec. act of July 23d, 1866. * * * The primary and controlling question in this case is, whether there is any basis for the claims of Naphtaly and Jones under the 7th section of the act of July 23d, 1866. Said section provides: 'That where persons in good faith and for
34 a valuable consideration have purchased lands from Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant and have used, improved and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title except that of the United States exists—such purchasers may purchase the same after having such land surveyed under existing laws at the minimum price established by law,'" etc.

It is claimed that this case falls under that part of the provisions relating to *rejected* grants and the questions which naturally and obviously arise are:

1st. Was there a Mexican grant?

2d. If so and not otherwise, there were grantees and assigns.

3d. Did persons in good faith and for a valuable consideration purchase lands from Mexican grantees or assigns?

4th. Was the purchase made before the grant was rejected?

5th. Has said purchaser used, improved and continued in the actual possession of the lands as according to the lines of original purchase?

The controlling question in the case, however, and upon which all others hinge, is: *Was there a grant?* Not a perfect grant in all its appointments, but one which was necessarily false, or forged or defective, on account of some technical non-conformity with the granting regulations, or invalid for want of authority in the
35 granting officials, or where it depended upon some determination of the court as to a particular feature of its essence.

In other words, the act has no relation to perfect grants, but to those which were so imperfect as to require their rejection.

This is manifestly a case in which there was no grant nor semblance of one.

It is based upon the assumption of a grant by Governor Micheltorena in the year 1844 to three brothers, Inocencio, Jose and Mariano Romero, for a sobrante of land lying between the ranchos of Moraga, Pacheco and Welsh. The board of land commissioners to whom the claim was referred for confirmation of title, said: "That it did not appear that any grant was ever issued to any person, and no equitable right appears on the part of any of the petitioners."

The U. S. district court, in its decision on appeal, held that *no grant, either perfect or incohate, was made, nor any promise given that one should be made.*

Hoffman's Rep'ts, Ex. 1, p. 219.

The U. S. Supreme Court on appeal, under consideration and comparison of the parole and documentary evidence of the case,

said: "The conclusion is irresistible that no grant ever issued by the governor."

1 Wall., 729.

If, then, as has been unequivocally decided by all the tribunals to which the claim has been referred, that there was no grant made either perfect or incohate nor any promise of one or any equitable rights attaching to any of the claimants, it must follow con-
36 clusively that the act of July 23rd, 1866, has no relevancy to the case in hand, and that the claim of Naphtaly and Jones must be rejected. * * *

Seventh. The defendants also offered in evidence the opinion and decision of Hon. W. F. Vilas, Secretary of the Interior of the United States, on appeal from the decision of the Commissioner of the General Land Office aforesaid, dated February 4th, 1889, and reported in full in vol. 8, Decisions of Department of the Interior, at p. 144.

That said opinion and decision may be read, used and considered herein for all purposes and with the like force and effect as though the same had been inserted in this bill of exceptions.

Eighth. The defendants also offered in evidence the opinion and decision of the Hon. George Chandler, acting Secretary of the Interior, dated June 23rd, 1891, upon plaintiff's motion for a review and reconsideration of said decision of Hon. W. F. Vilas, the late Secretary of the Interior, and which was duly presented to the Secretary of the Interior on March 1st, 1889, and reported in full in vol. 12, Decisions of Department of Interior, p. 667.

That said opinion and decision may be read, used and considered herein for all purposes and with like force and effect as though the same had been inserted in this bill of exceptions.

Ninth. The defendants also offered in evidence the opinion and decision of Hon. John W. Noble, Secretary of the Interior, dated May 18th, 1892, upon the matter of the application of the plaintiff to purchase said land. Such decision is reported in full in vol. 14, Decisions of Department of the Interior, page 536.

37 That said decision may be read, used and considered herein for all purposes and with like force and effect as though the same had been inserted in this bill of exceptions.

The plaintiff by his counsel objected to the introduction of each of the above documents in evidence on the ground that such evidence was immaterial, incompetent and irrelevant for the purpose of effecting the validity of said patents.

The court sustained said objection, to which ruling of the court the defendants by their counsel then and there duly excepted.

Here the defendants rested, and the court then, on the 23rd day of January, 1895, to which date the trial of said cause had been continued, ordered judgment to be entered in favor of the plaintiff

and against the defendants in accordance with the prayer of the complaint.

The defendants hereby present the foregoing as their bill of exceptions herein as amended and pray that the same be allowed and certified by the judge of this court.

H. F. CRANE &
PHILIP TEARE,
Att'ys for Def'ts.

The foregoing bill of exceptions is hereby approved and pl'ffs consent that the same may be so settled by the judge of this court.

NAPHTALY.
FREIDENRICH & ACKERMAN,
Att'ys for Pl'ff.

38 This is to certify that the above and foregoing bill of exceptions has been approved and settled by me.

JOSEPH McKENNA, *Judge.*

(Endorsed:) Filed March 5th, 1895. W. J. Costigan, clerk.

In the United States Circuit Court, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, Defendants. } No. 11900.

Petition of the Defendants for an Order Allowing a Writ of Error.

The defendants in the above-entitled cause feeling themselves aggrieved by the decision and judgment of said court, entered herein on the 21st day of February, 1895, whereby it was ordered, adjudged and decreed that the plaintiff do have and recover possession of the lands and premises described in said judgment, with costs. Now comes the said defendants, by H. F. Crane and Philip Teare, Esq's, their attorneys, and petition said court for an order allowing a writ of error to the honorable, the United States circuit court of appeals for the ninth circuit, under and according to the laws of the United States in that behalf made and provided, and also for an order fixing the amount of security, which the defendants shall give upon said writ of error and upon the giving of such security, that
39 all further proceedings in said court be suspended and stayed until the determination of said writ of error by said United States circuit court of appeals for the ninth circuit, and your petitioners will ever pray, etc.

H. F. CRANE AND
PHILIP TEARE,
Att'ys for Defendants.

Order Allowing Writ of Error and Fixing Bond.

Let the writ of error issue as prayed for.

It is further ordered, that the bond on writ of error be, and the

same is hereby, fixed at the sum of one thousand dollars, the same to stay all further proceedings in this court, until the final determination of the cause by the United States circuit court of appeals for the ninth circuit, and for damages and costs.

JOSEPH McKENNA,
Circuit Judge.

Dated San Francisco, Calif., Aug. 14th, 1895.

(Endorsed:) Filed August 14, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit, Northern District of California.

JULIUS A. BELEY *et al.*, Plaintiffs in Error,
vs.
JOSEPH NAPHTALY, Defendant in Error. } No. 11900.

Assignment of Errors.

The decision and judgment of the court is erroneous in the following particulars, to wit:

40 First.

The court erred in denying the right of the defendants to prove on the trial that the patents put in evidence and alone relied upon by the defendant in error as the evidence of his title to the land described in the complaint, were issued by the officers of the Land Department of the United States without authority of law, and in the absence of any legislation by Congress giving them authority so to do.

Second.

The court erred in refusing to permit the plaintiffs in error to introduce evidence on the trial showing that on the 10th day of August, 1883, the defendant in error made a written application and filed the same in the United States Land Office claiming and asking leave to be permitted to purchase from the United States about three thousand (3,000) acres of the public lands, situate in Contra Costa county, California; stating, upon his oath, that said land was a part of a tract of land, granted by the Mexican government in the year 1844 to Inocencio Romero and others, and which land had been conveyed by said Romero, in the year 1853, to Domingo Pujol and Francisco Sanjurjo. That said claim of the Romeros to said land was finally rejected in the December term, of the year 1863, by the Supreme Court of the United States, and that on the 15th day of May, 1876, he, the defendant in error, had purchased said tract of land, and had by mesne conveyances, become the successor in interest of said Pujol, and Sanjurjo, and that he claimed the right to

purchase said tract of land, under and in pursuance of the
41 provisions of the 7th section of an act of Congress, entitled "An act to quiet land titles in California," approved July 23rd, 1866, and that the land described in said patents was a part of said tract.

Third.

The court erred in refusing to permit the plaintiffs in error to introduce in evidence, the entire and completed record of the Mexican government relating to said Romero claim; which shows that said Romeros did, on the 18th day of January, 1844, present a petition to the Mexican governor, Micheltorena, praying for a grant of certain land, embracing the land in controversy, that certain orders were made and entered in said record, viz: an order requiring an alcalde to make, examine, and report to the governor as to the condition of said land, the report of said alcalde, a further order of the governor, requiring the land to be measured and its boundaries ascertained, and that one De Soto who claimed some interest in the land be required to appear before him, to be examined as to the nature of his claim, that the owners of adjoining lands be required to be present at the fixing of the boundaries, etc.

That on the 27th of March, 1844, the Romeros make and present to the governor a second petition in which they seek to excuse themselves from the performance of the order relating to the measurement of the tract of land etc., and ask that a provisional grant be made them.

This is followed by a communication and report of the
42 secretary, Manuel Jimeno, to the governor, advising that the former order in regard to the measuring the land be insisted upon, and carried into effect, and that Senor Romero do appear, with Senor De Soto, who claims a right to the same tract of land.

March 23rd, 1844, the governor replies as follows, viz:

"Let everything be done agreeably to the foregoing report.

MICHELTORENA."

The above is the last entry in said record.

Fourth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence on the trial, showing that the board of land commissioners, the district and the supreme courts of the United States, upon the presentation of said Romero claim to said land and confirmation, each held, found, decreed and adjudged, at divers times on and prior to December, 1863, that no grant or semblance of a grant, or other evidence of right, title or interest had ever been issued or given by the Mexican government to said Romeros, or either of them, for said tract of land, or any part thereof, and that they, and neither of them, had ever acquired any interest or claim thereto, and that said claim was rejected by each of said tribunals upon that ground alone.

Fifth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that each of the officers of the
43 Land Department, in hearing and deciding upon the right of the plaintiff to purchase said tract of land, under said act of Congress, had full knowledge of the fact that said Romeros never had any claim to said land, and that the courts had so decided and adjudged, and that each of said officers well knew and expressly found, held, assumed and decided, as a matter of fact, that no grant or semblance of a grant or other evidence of claim or interest was ever given by the Mexican government to said Romeros, or any of them, or that they or any of them ever acquired any claim or interest in said land.

Sixth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that Hon. W. A. J. Sparks, the Commissioner of the General Land Office, on the 2d day of March, 1887, rejected the application of the plaintiff to purchase said land under said act of Congress; that he signed and filed a written decision in which he finds, declares and decides that the defendant in error was not a purchaser from a Mexican grantee or his assigns, or any person or persons who had any interest in said land; that the Romeros never had any grant or semblance of a grant from the Mexican government, and never acquired any claim to or interest in said land or any part thereof and that it had been so adjudged by the board of land commissioners and the district and supreme courts of the United States. That the 7th section of the act of Congress of July 23d, 1866, had no relevancy to the case of the plaintiff.

44 Seventh.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that the Hon. W. F. Vilas, as Secretary of the Interior of the United States, did on the 4th day of February, 1889, upon an appeal to him by the defendant in error in the matter of said application from the said decision of the Commissioner of the General Land Office, make and cause to be entered his final decision therein, wherein and whereby he approved and affirmed the finding of facts and the law as set forth in the decision of said commissioners as aforesaid, whereby said application of defendant in error was finally rejected by the Land Department of the United States. (Vol. 8, Decis. Dept. Int., page 144.)

Eighth.

The court erred in refusing to permit plaintiffs in error to introduce evidence showing, that on the 23d day of June, 1891, the Hon. John W. Noble, then Secretary of the Interior, and the successor in office of the said Hon. W. F. Vilas, caused to be entered an order purporting to grant to the defendant in error a rehearing of his said application. (Vol. 12, Decis. Dept. Int., page 667.)

Ninth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that on the 18th day of May, 1892, the Hon. John W. Noble, then Secretary of the Interior and successor in office of said Hon. W. F. Vilas, made a decision in the
45 matter of the application of the defendant in error upon the rehearing granted by him and upon the same facts found and made the basis of the decisions of said Commissioners of the General Land Office aforesaid and the said Hon. W. F. Vilas, Secretary of the Interior aforesaid, wherein and whereby the said Hon. John W. Noble decided that the defendant in error be permitted to purchase of the United States, said tract of land, containing about three thousand (3,000) acres of the public lands of the United States, under and by virtue of the 7th section of the act of Congress of July 23rd, 1866 (14 U. S. Stat. at Large, 218), and receive U. S. patents therefor.

Tenth.

The court erred in refusing to permit the plaintiffs in error to introduce evidence showing that said sale was made to the defendant in error and that the patents in evidence herein were issued to him embracing a portion of the tract of land described in the said application of the defendant in error, by virtue of said decision of said Hon. John W. Noble, and in pursuance of the provisions of the 7th section of said act of Congress aforesaid.

Eleventh.

The court erred in rendering judgment in favor of the defendant in error and against the plaintiffs in error, by assuming that the acts of the Land Department were conclusive of the rights of the parties under the provisions of the 7th section of the act of Congress, approved July 23rd, 1866, entitled "An act to quiet land titles in California."

46 Wherefore, the plaintiffs in error pray that the judgment of the circuit court of the United States, for the northern district of California, be reversed, and that the said circuit court be directed to grant a new trial herein.

H. F. CRANE AND
PHILIP TEARE,
Attorneys for Plaintiffs in Error.

(Endorsed:) Filed August 14, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

Bond on Writ of Error.

Know all men by these presents that I, Julius A. Beley, as principal, and David P. Smith and Mrs. Marie C. Tackley, as sureties, are held and firmly bound unto Joseph Naphtaly in the full and just sum of one thousand dollars, to be paid to the said Joseph Naphtaly, his certain attorneys, executors, administrators or assigns;

to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a circuit court of the United States, for the northern district of California, in a suit pending in said court, between Joseph Nathtaly, plaintiff, and Julius A. Beley, and others, defendants, a judgment was rendered against the said Julius A. Beley, and the said Beley having obtained from said court a
47 writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph Naphtaly, citing and admonishing him to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at San Francisco, in the State of California, on the sixth day of September next:

Now, the condition of the above obligation is such, that if the said Julius A. Beley shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JULIUS A. BELEY. [SEAL.]
DAVID P. SMITH. [SEAL.]
MRS. MARIE C. TACKLEY. [SEAL.]

Acknowledged before me the day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA, }
Northern District of California, } *ss:*

David P. Smith and Mrs. Marie C. Tackley, being duly sworn, each for himself, deposes and says, that he is a householder in said district, and is worth the sum of one thousand dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

DAVID P. SMITH.
MRS. MARIE C. TACKLEY.

48 Subscribed and sworn to before me this 19th day of August, A. D. 1895.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

(Endorsed:) Form of bond and sufficiency of securities approved. Joseph McKenna, circuit judge. Filed Aug. 19, 1895. W. J. Costigan, clerk.

In the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

JOSEPH NAPHTALY, Plaintiff,
vs.
JULIUS A. BELEY *et al.*, Defendants. } No. 11900.

Certificate to Transcript.

I, W. J. Costigan, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing pages, numbered from 1 to 55 inclusive, to be full, true and correct copies of the amended complaint filed June 15, 1894, answer of Beley, filed June 20, 1894; answer of Darling, filed June 20, 1894; judgment, entered February 21, 1895; motion for new trial; order denying motion for new trial; bill of exceptions as settled and
49 allowed; petition for and order allowing writ of error; assignment of errors and bond on writ of error, in the therein-entitled cause, as the same remain of record and on file in the office of the clerk of said court.

I further certify, that the cost of the foregoing copies is $32.90, and that said amount was paid by Julius A. Beley.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said circuit court, this 2nd day of September, A. D. 1895.

[SEAL.] W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Julius A. Beley, F. Darling and Charles Brigard, plaintiffs in error, and Joseph Naphtaly, defendant in error, a manifest error hath happened, to the great damage of the
50 said Julius A. Beley, F. Darling and Charles Brigard, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the second day of September next, in the said circuit court of appeals, to be then and there held, that the record and

proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.]

W. J. COSTIGAN,
Clerk of the United States Circuit Court for the Ninth Circuit, Northern District of California.

Allowed by:
JOSEPH McKENNA,
Circuit Judge.

51 On this 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared before me, the undersigned, F. D. Monckton, commissioner U. S. circuit court, northern dist. of California, and clerk U. S. circuit court of appeals, ninth circuit, the subscriber, H. F. Crane, and makes oath that he delivered a true copy of the within writ of error to Joseph Naphtaly, personally, at his office, in the city and county of San Francisco, State of California, on the 19th day of August, 1895.

H. F. CRANE.

Sworn to and subscribed the 19th day of August, A. D. 1895.

[SEAL.]

F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern Dist. of California, and Clerk U. S. Circuit Court of Appeals, Ninth Circuit.

(Endorsed:) Original. United States circuit court of appeals for the ninth circuit. Julius A. Beley *et al.*, plaintiffs in error, *vs.* Joseph Naphtaly, defendant in error. Writ of error. Filed August 20, 1895. W. J. Costigan, clerk U. S. circuit court, northern district of California, by W. B. Beaizley, deputy clerk.

Return to Writ of Error.

The foregoing transcript of such portions of the record and proceedings in the cause in the preceding writ of error mentioned, as have been prepared at the request of the attorneys for the plaintiffs in error, and are by me certified to be true and correct, are,
52 at the request and direction of said attorneys for the plaintiffs in error, hereby annexed to said writ of error as the return thereto.

Attest:
[SEAL.]

W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph Naphtaly, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 2d day of September next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the northern district of California, in that certain action numbered 11900, in which Julius A. Beley, F. Darling and Charles Brigard are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, judge of the United States circuit court, in and for the northern district of California this 19th day of August, A. D. 1895.

JOSEPH McKENNA,
Judge U. S. Circuit Court, Northern District of California.

53 On this 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared before me, the undersigned, F. D. Monckton, commissioner U. S. circuit court, northern district of California, and clerk U. S. circuit court of appeals, ninth circuit, the subscriber, H. F. Crane, and makes oath that he delivered a true copy of the within citation to Joseph Naphtaly, personally, at his office in the city and county of San Francisco, State of California, on the 19th day of August, 1895.

H. F. CRANE.

Sworn to and subscribed the 19th day of August, A. D. 1895.

[SEAL.] F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern District of California, and Clerk U. S. Circuit Court of Appeals, Ninth Circuit.

(Endorsed:) Original. Citation. Filed August 20, 1895. W. J. Costigan, clerk U. S. circuit court, northern district of California, by W. B. Beaizley, deputy clerk.

(Endorsed:) No. 251. In the United States circuit court of appeals, for the ninth circuit. Julius Beley, *et al.* plaintiffs in error, *vs.* Joseph Naphtaly, defendant in error. In error to the circuit court of the United States, for the ninth judicial circuit, in and for the northern district of California. Filed September 2d, 1895. F. D. Monckton, clerk.

54 In the United States Circuit Court of Appeals for the Ninth Circuit.

JULIUS BELEY *et als.*, Plaintiffs in Error,
vs.
JOSEPH NAPHTALY, Defendant in Error. } No. 251.

Error to the circuit court of the United States for the northern district of California.

H. F. Crane and Philip Teare, for plaintiff- in error; A. L. Rhodes, for defendant in error.

Before Gilbert and Ross, circuit judges, and Morrow, district judge.

Ross, circuit judge, delivered the opinion of the court:

This action was brought by the plaintiff, defendant in error here, to recover the possession of various lots and parcels of land, described according to the public surveys of the United States, situated in Contra Costa county, California, and also damages for the withholding thereof, the plaintiff relying for title thereto upon two patents issued by the Government of the United States pursuant to an approved application by him to purchase the lands under and by virtue of the seventh section of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California" (14 Stats., 218). That section provides "that where persons, in good faith and for a valuable consideration, have purchased land of Mexican
55 grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same after having such lands surveyed under existing laws at the minimum price established by law, upon first making proofs of the facts as required in this section, under regulations to be provided by the Commissioner of the General Land Office."

The bill of exceptions recites that on the trial, after introducing the patents in evidence, the plaintiff proved that when he was in the quiet and peaceable possession of the lands the defendants entered thereon and ousted the plaintiff therefrom, and have since withheld the lands from him; that the plaintiff also proved the rental value of the premises, and that it was then admitted by the counsel for the defendants that at the time of the issuance of the patents the lands in question were public lands of the United States, subject to sale under its laws, and "that defendants did not propose to connect themselves in any manner or form with the title of the United States to the premises described in the complaint herein (and in the patents) or any part thereof, either by certificate of purchase, patent, or anything of the kind."

Confessedly, therefore, the defendants are mere naked trespassers.

As such they claimed the right in the court below to attack the validity of the patents issued to the plaintiff in the action, and for that purpose offered in evidence the following documents:

56 First. The application of the plaintiff to purchase the lands from the United States under and pursuant to the provisions of the seventh section of the act of July 23, 1866, which application set forth, among other things, that the lands were included within the exterior limits and formed part of a grant made by the Mexican government in the year 1844 to Inocencio, José, and Mariano Romero, three brothers, who presented their claim thereto for confirmation to the board of land commissioners created by the act of Congress of 1851 for the ascertainment and settlement of private land claims in California, which claim was rejected by the commission and afterwards, on appeal, by the United States district court for California and by the supreme court; that in 1846 or 1847 the Romero brothers partitioned the lands claimed by them under the grant, Inocencio taking that part thereof embraced within a certain enclosure and including the lands sought to be purchased by the applicant, and that In-cencio Romero used and cultivated the same until December 26, 1853, when he sold and conveyed the same for value to Domingo Pujol and Francisco Sanjurjo, who entered into possession of the lands within the enclosure and used, improved, and continued in the actual possession of those lands according to the lines of their original purchase until February 14, 1855, when they sold and conveyed the same for value to one J. W. Tice, who entered into the possession thereof, used, improved, and cultivated the same, and continued in the actual possession thereof until August 8, 1859, when he conveyed the same and transferred the possession thereof to one S. P. Millett; that Millett then entered into the possession of the lands so enclosed, used, improved, and cultivated the same and continued in the actual possession

57 thereof, according to the lines of the original purchase, until 1868, when he conveyed the same to D. P. Smith, who, in February, 1869, conveyed the same to J. P. Spring, who, in March, 1869, conveyed the same to Martin Clark, who, on May 15, 1876, conveyed the same to the applicant, Naphtaly; that the conveyance to Smith was made, according to the information and belief of the applicant, for the benefit of Millett, and the conveyances to Spring and Clark were made for the benefit of the applicant, who entered into the exclusive possession of the lands, according to the lines of the original purchase made by Pujol and Sanjurjo from Inocencio Romero, according to the information and belief of the applicant; that, according to his information and belief, the applicant and his grantors and predecessors in interest have been in the actual and continuous possession of the lands sought to be purchased by him ever since the year 1847, according to the lines of the original purchase; that on July 23, 1866, there was no adverse claim by any person to the lands or any part thereof; that they are not mineral lands and have not been reserved to the United States for any purpose.

Second. The record of the Romero claim from the office of the surveyor general of the United States for California.

Third. The opinion and decree of the board of land commissioners rejecting the claim.

Fourth. The opinion and judgment of the United States district court for the district of California, as reported in 1 Hoffman's Reports, 219, affirming the decision of the commissioners.

Fifth. The opinion and judgment of the Supreme Court of the United States, as reported in 1 Wallace's Reports, 721, affirming the decision of the district court.

Sixth. The opinion and decision of the Commissioner of
58 the General Land Office rejecting the application of Naphtaly to purchase the lands.

Seventh. The opinion and decision of Secretary of the Interior Vilas, as reported in volume 8 of the Decisions of the Department of the Interior, 144, affirming the decision of the Commissioner of the General Land Office.

Eighth. The opinion and decision of acting Secretary of the Interior Chandler, as reported in volume 12, Decisions of the Department of the Interior, 667, ordering a rehearing of the application to purchase.

Ninth. The opinion and decision of Secretary of the Interior Noble on the rehearing, as reported in volume 14 of the Decisions of the Department of the Interior, 536, approving the application and directing patents for the lands in question to be issued to the applicant.

To each and all of the documents so offered in evidence the plaintiff objected on the ground that such evidence was immaterial, incompetent, and irrelevant. The action of the court below in sustaining the objections and excluding the documents constitute the grounds of the appeal.

Assuming that the defendants, being admittedly mere naked trespassers upon the lands in question, are entitled to attack the patents issued to the plaintiff, we proceed to inquire whether any of the documents offered in evidence tend to affect their validity.

Beyond question the patents are absolutely conclusive in respect to all matters of fact properly cognizable by the officers of the Land Department. The decisions of the Supreme Court and of other courts to this effect are so numerous as to render their citation no
59 longer necessary. The real ground of the defendants' contention, however, is that, inasmuch as it was found and held by the United States tribunals that no grant was ever made by the Mexican government to the Romeros, nor anything in the semblance of a grant, there was absolutely no case presented by the applicant, Naphtaly, to the officers of the Land Department for the application of the provisions of the seventh section of the act of Congress of July 23, 1866, and that the disposal of the lands in question to the applicant by virtue of those provisions was beyond the power of the Secretary of the Interior because unauthorized by law.

It is also contended by defendants that one Secretary of the Inte-

rior has no power to grant a rehearing of a case decided by his predecessor, and that the reconsideration of Naphtaly's application to purchase by Mr. Secretary Noble and its allowance by him was, therefore, without authority of law and void. Noble *vs.* Union River Logging Co., 147 U. S., 165, and United States *vs.* Stone, 2 Wall., 537, are cited in support of this position, but neither of those cases at all support it. In Noble *vs.* Union River Logging Company, the company, desiring to avail itself of the act of Congress of March 3, 1875 (18 Stats., 482), granting to railroads a right of way through the public lands, took the steps required by the statute to secure that right. When all of those requirements had been observed the Secretary of the Interior was authorized to approve the profile of the road and to cause such approval to be noted upon the plats in the land office of the district where such land was located, and thereupon the granting section of the act became operative and vested in the company the right of way. The court held that after this was done it was beyond the power of a succeeding Secretary to revoke the
60 action of his predecessor in office, for the title had already passed to the grantee. In United States *vs.* Stone the Secretary of the Interior undertook to revoke a patent that had been signed by the President and issued. But where, as in this case, no steps had been taken even looking to the conclusion of the proceedings in accordance with the ruling of the Secretary of the Interior, there can be no doubt of his power or of that of his successor in office, upon a seasonable application, to reconsider any ruling in respect to the proper disposition of the land. As said by the Supreme Court, in New Orleans *vs.* Paine, 147 U. S., 261, "until the matter is closed by final action the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing." See also United States *vs.* Schurz, 102 U. S., 378; Le Roy *vs.* Jamison, 3 Saw., 389.

The documents offered in evidence bearing date during the Mexican rule are as follows:

1. A petition signed by the claimants and dated at Monterey on the 18th day of January, 1844, wherein they solicit a grant of a certain tract of land described as a *sobrante* of three adjacent ranchos.

2. Connected with the petition is a marginal decree of the same date directing the Secretary to report upon the subject, "having first taken such steps as he may deem necessary."

3. Certificate of the Secretary, also of the same date, that the governor directs the first alcalde of San José to summon the occupants of the adjacent ranchos and hear their allegations and make report of his doings.

4. Report of the alcalde, under date 1st of February of the
61 same year, to the effect that the rancheros mentioned and the petitioners had been confronted, and that the former made no objection to the application; but he also reported that it had come to his knowledge that one Francisco Soto, six or seven years before, had claimed the same tract.

5. Ten days after that document was filed the Secretary reported to the governor that it would seem, according to that report, that there was no obstacle to the making of the grant.

6. Subsequently, however, the governor entered a decree directing the judge of the proper district to take measurements of the land in the presence of the adjacent proprietors, and that he "certify the result, so that it may be granted to the petitioners."

7. Second petition of the claimants, under date of the 21st of March, 1844, in which they stated that the judge of San José had never been able to execute the order of survey on account of the absence or engagements of the adjacent proprietors, and asked that the governor would grant the tract to them provisionally or in such manner as he should deem fit.

8. The record contains no order of reference of the second petition, but the Secretary two days after its date made a report to the governor, expressing the opinion that the former order of survey ought first to be carried into effect, and when the survey should be made the suggestion was that the prior claimant and the petitioners should be confronted in order that the governor might be able to "determine what is best."

9. Final degree of the governor is in the words following, to wit: "Let everything be done agreeably to the foregoing report," which concludes the record of the Mexican documents offered
62 in evidence.

The Supreme Court held, in the case of Romero *vs.* United States, 68 U. S., 740, that those documents afforded no evidence that a grant or concession of any kind was ever issued by the Mexican government to the Romeros, but that, on the contrary, "the documents, as a whole, fully show that up to the date of the last-named decree no such grant had ever been issued. Survey of the tract," continued the court, "was first to be made, and the parties supposed to be opposed in interest were then to be summoned and heard as preliminary conditions to the hearing of the application. Record furnishes no evidence of a reliable character that either of those conditions was ever fulfilled. Evidence to show that the survey was made is entirely wanting. First-named claimant was summoned as a witness, and he testified that the pretensions of the prior claimants were overruled and abandoned, but the explanations given by him, in view of the documents in the case, are not satisfactory."

The court found the parol evidence tending to show the issuance and existence of the claimed grant to be insufficient to overcome the conclusive nature of the documentary evidence and accordingly affirmed the decree of the district court, thus finally, in December, 1863, rejecting the claim of the Romeros. Prior to this final rejection, however, Inocencio Romero, to wit, on December 26, 1853, according to the facts as alleged before the officers of the Land Department and conclusively passed upon by them, sold and conveyed for value to Domingo Pujol and Francisco Sanjurjo that portion of the lands embraced within the Mexican claim which was within the enclosure mentioned and which was set apart to him in
63 the partition of 1846 or 1847, and which, according to the allegations there made and passed upon, he had ever since

used and cultivated; and, through subsequent mesne conveyances, the same right and interest passed to S. P. Millett August 8, 1859, who then entered into the possession of the lands in question, used, improved, and cultivated the same and continued in the actual possession thereof according to the lines of the original purchase at the time of and after the passage of the act of Congress of July 23, 1866.

At that date—July 23, 1866—the lands in question being public lands of the United States not reserved for any purpose whatever and to which no adverse claim of any nature existed, and Millett being a grantee for value under Inocencio Romero and having purchased in good faith while the claim to the land under the alleged Mexican grant was being prosecuted before the tribunals authorized by law to settle such claims and before its rejection, there can be no doubt, we think, that Millett was entitled to purchase the lands under the provisions of the seventh section of the act of July 23, 1866. It was for the very purpose of meeting and obviating the hardships resulting from the rejection in numerous instances of claims to lands under supposed or defective Mexican grants that this act was passed. It was strictly remedial in its nature and, as such, should receive a broad and liberal construction, to the end that its purposes be accomplished and not defeated. Indeed, it is not unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect in order "to include cases within the same mischief" (Dean of York *vs.* Middleburg, Y. & J. Exch. Rep., 196; see also Potter's Dwarris, p. 231; United States *vs.*
64 Wiltberger, 5 Wheat., 76; American Fire Co. *vs.* United States, 2 Pet., 358; United States *vs.* Hodson, 10 Wall., 395; White *vs.* Steam Tug Mary Ann, 6 Cal., 462; Jackson *vs.* Warren, 32 Ill., 321); but certainly, as respects Millett, there is no need to extend the natural meaning of the words of the act of 1866 to bring him within the beneficent provisions of its seventh section. The fact that it was determined by all of the United States tribunals charged with the duty of deciding the question that there never was, in fact, any grant or concession by the Mexican government to the Romeros, and that their claim to lands under the alleged grant was rejected, does not render the act inapplicable to Millett. When he purchased in good faith and for value from an intermediate grantee of In-cencio Romero the claim was being earnestly pressed before the courts of the United States that there was such a grant, and their records show that there was parol evidence of its actual issuance and existence. Besides, the issuance of a grant was not always essential to the confirmation of such a claim. In the case of The United States *vs.* Alviso, 23 How., 313, the Supreme Court refused to disturb and affirmed the decree of the court below confirming a claim to land where no grant was in fact issued by the Mexican authorities, but where, pending the proceedings by those authorities upon the petition for the grant, the petitioner was given permission to occupy the land, then vacant, which he did for fourteen years, during which time he was recognized as its owner and possessed the requisite qualifications, and no suspicion existed unfavorable to the *bona fides* of

his petition or the continuity of his possession and claim and where there was no adverse claim.

Surely one who purchased in good faith and for value the land under such a claim as that of the Romeros before its final
65 rejection is as much entitled to the preferred right conferred by the seventh section of the act of July 23, 1866, as is one who makes a similar purchase under a supposed grant afterwards adjudged to be forged or otherwise fraudulent. It was, as has been said, to meet and obviate the hardships growing out of all such and similar cases that the act in question was passed.

But before the right conferred by the seventh section of the act of July 23, 1866, upon Millett could be exercised a survey of the lands and the filing of the plats thereof by the Government of the United States was necessary. It appears, from the decision of the Secretary of the Interior (vol. 8, Decisions of the Department of the Interior, 144) that the township plats of such survey embracing the lands in question were filed in the local land office July 30, 1878, for township one south and on October 5, 1878, for township 1 north. These plats were withdrawn October 24, 1878, restored February 24, 1882, suspended March 9, 1882, and the suspension removed April 16, 1883. On August 10, 1883, Naphtaly filed his application to purchase. Had the preferred right of purchass conferred by the seventh section of the act of July 23, 1866, on Millett remained in him, certainly he could not have exercised it earlier than July 30, 1878, when the first of the township plats was filed in the local land office. Suppose, while that right thus existed in him without the power to exercise it, because of the failure of the Government to survey the land, Millett had died, would not the right have passed to his heirs? Undoubtedly so. It is equally clear, we think, that it was assignable. It is elementary that every right, title, interest, or claim in lands is assignable or descends to heirs un-
66 less such transfer or descent is prohibited by statute (Co. Litt., 46*b*; Washburn on Real Prop., ch. 1, sec. 20; Myers *vs.* Croft, 13 Wall., 291; Lamb *vs.* Davenport, *id.*, 418). The act of July 23, 1866, places no such restriction, limitation, or condition upon the right therein created. The preferred right of purchase thereby given is analogous to the pre-emption laws of April 12, 1814 (3 Stats., 122), and June 19, 1834 (4 Stats., 678), which right the Supreme Court held, in Thredgill *vs.* Pintard (12 How., 24), was assignable. The only difference between the two is that the preferred right of purchase given by the act of 1866 is based on conditions precedent, while the right of pre-emption given by the acts of 1814 and 1834 was based on conditions subsequent, a difference wholly unimportant in determining the nature and extent of the right.

In Lamb *vs.* Davenport, 18 Wall., 307, the Supreme Court held that unless forbidden by some positive law contracts made by actual settlers on the public lands concerning their possessory rights and concerning the title to be acquired in future from the United States are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and

though the Government is under no obligation to either of the parties in regard to the title, and, accordingly, that the right of entry conferred by the Oregon donation act of September 27, 1850 (9 Stats., 496), enured to the benefit of grantees under the prior possessory right.

Such authoritative recognition of the assignability, in the absence of statutory prohibition, of such possessory rights and right
67 of pre-emption is, in our judgment, conclusive in favor of the assignability of the preferred right of purchase given by the seventh section of the act of July 23, 1866. This view was adopted by the Secretary of the Interior in 1873, and has ever since prevailed in the Land Department. (Wilson *vs.* C. & O. R. R. Co., 1 C. C. L., 471; Owen *vs.* Stevens, 3 L. D., 401; Welch *vs.* Molino, 7 L. D., 210.)

It is true, as urged on the part of the defendants, that Naphtaly purchased with notice of the final rejection of the Mexican claim, but it is equally true that he purchased with knowledge of the act of July 23, 1866, and with a knowledge that under that act there existed in his grantor a preferred right of purchase which was assignable and which he had the legal right to purchase and which he did purchase in good faith and for value. In respect to all matters of fact, such as the possession, use, and improvement of the lands, the respective purchases, how and for what made, the patent, as has been said, is conclusive; and, holding, as we do, that the preferred right of purchase is assignable, it results that the preferred evidence, had it been admitted, could not have affected the validity of the plaintiff's patents.

We are of opinion, further, that the court below did not err in sustaining the objections to the evidence offered by the defendants. Admitting, as they did, that the lands in question were public lands of the United States, subject to sale under its laws, for which the plaintiff brought into court patents of the United States regular in form, those instruments are absolutely conclusive against any collateral attack by mere intruders upon the lands covered by them, such as the defendants confess themselves to be. (Smelting
68 Co. *vs.* Kemp, 104 U. S., 546; Steel *vs.* Smelting Co., 106 U. S., 447; Barden *vs.* Railroad Co., 154 U. S., 328; Buena Vista Petroleum Co. *vs.* Tulare Oil & Mining Co., 67 Fed. Rep., 226; United States *vs.* Winona & St. P. R. Co. *et al.*, *id.*, 948.)

Judgment affirmed.

(Endorsed:) Opinion. Filed Feb. 3, 1896. F. D. Monckton, clerk.

69 United States Circuit Court of Appeals for the Ninth Circuit.

JULIUS A. BELEY, F. DARLING, and CHARLES BRIGARD, Plaintiffs in Error, *vs.* JOSEPH NAPHTALY. } No. 251.

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed Feb. 3, 1896. F. D. Monckton, clerk.

70 Supreme Court of the United States, D. C.

JULIUS A. BELEY *et al.*, Pl'ffs in Error, *vs.* JOSEPH NAPHTALY, Def't in Error.

Petition on Behalf of Pl'ffs in Error that a Writ of Error be Issued Out of Above Court.

The plaintiffs in error in this cause, feeling themselves aggrieved by the decision and judgment of the U. S. circuit court of appeals, 9th circuit, northern district of California, entered herein on the 3d day of February, 1896, whereby it was ordered, adjudged, and decreed that a judgment heretofore made and entered in the U. S. circuit court on the 21st day of February, 1895, for the recovery of the possession of certain lands described therein, with costs, be affirmed—

Now comes the plaintiffs in error, by their attorneys, and petition the court first above named that a writ of error do issue out of said court under and in accordance with the laws of the United States in that behalf made and provided, and also for an order fixing the amount of security which the plaintiffs in error shall give upon said writ of error, and upon the giving of such security that all further proceedings in said circuit court be suspended and stayed until the determination of said writ of error by said U. S. Supreme
71 Court; and your petitioners will ever pray, etc.

HENRY F. CRANE,
PHILIP TEARE,
Att'ys for Pl'ffs in Error.

Let the writ of error issue as prayed. The bond is fixed in the sum of five thousand dollars, the same to stay all further proceedings in the circuit court until final determination of cause and for damages and costs.

(Endorsed:) Petition for writ of error. Filed March 31, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

72 United States Circuit Court of Appeals for the Ninth Circuit.

JULIUS A. BELEY *et al.*, Plaintiffs in Error,
vs.
JOSEPH NAPHTALY, Defendant in Error. } No. 251.

Assignments of Error in U. S. Supreme Court.

1st. The court erred in holding that plaintiffs in error as against the defendant in error were and are naked trespassers on the land because they could not connect themselves with any title from the United States.

2nd. The court erred in holding that because the plaintiffs in error were unable to connect themselves with the title of the United States they could not be permitted to show that the patents in evidence were issued without authority of law and were therefore void.

3rd. The court erred in holding that after the Commissioner of the General Land Office and the Secretary of the Interior had heard, tried, and finally determined the right of the defendant in error to purchase said land under the 7th section, act of July 23d, 1866, still such determination was not final in the Land Department, and that a succeeding Secretary had the power and right to reopen the matter and permit such purchase after it had been finally rejected by said former final determination.

4th. The court erred in assuming and holding that the defendant in error was a person who had in good faith and for a valuable
73 consideration purchased said land of a Mexican grantee or assigns, which grant had subsequently been rejected, and who had used, improved, and continued in the actual possession of the same according to the lines of his original purchase.

5th. The court erred in assuming that said 3,000 acres of land or any part thereof had ever been enclosed in any manner or ever had any ascertained boundary lines or any known boundaries whatever.

6th. The court erred in assuming and holding that the rights conferred by section 7, act of July 23, 1866, could not be made available until the United States public surveys had been made and run on the land.

7th. The court erred in assuming and holding that S. P. Millett was in October, 1859, or at any time a purchaser of said land in good faith under the provisions of said statute or for a valuable consideration, or was such a purchaser as contemplated by said statute, and that he became entitled to make any purchase of said land thereunder.

8th. The court erred in holding that the defendant in error, by becoming a remote purchaser of a possessory claim of an indefinite and undescribed tract of the public land from said Millett in May, 1875, by mesne conveyance, thereby acquired the right in 1883 to

cause 3,000 acres of the public land in Contra Costa county, California, to be surveyed and platted and to purchase the same from the United States.

9th. The court erred in holding in effect that the decision of Secretary Noble in allowing and permitting such purchase by the defendant in error was and is conclusive upon the plaintiffs in error upon all questions of law and fact.

10th. The court erred in holding said sale and the patents issued to defendant thereunder and in pursuance thereof to be legal and valid and to pass the title of said land to defendant in error,
74 and erred in affirming the judgment of the circuit court herein.

Wherefore plaintiffs in error pray that the judgment of the U. S. circuit court of appeals be reversed, and that the cause be remanded with direction that the judgment of the circuit court be set aside and a new trial ordered.

H. F. CRANE,
Of Counsel for Pl'ffs in Error.

(Endorsed:) Amended assignment of errors. Filed May 8th, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

75 Know all men by these presents that we, Julius A. Beley, F. Darling, and Charles Brigard, as principals, and David P. Smith and Marie C. Tackley, as sureties, are held and firmly bound unto Joseph Naphtaly in the full and just sum of five thousand dollars, to be paid to the said Joseph Naphtaly, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a U. S. circuit court of appeals *of the United States* for the ninth circuit, in a suit depending in said court between Julius A. Beley, F. Darling, and Charles Brigard, as plaintiffs in error, and Joseph Naphtaly, as defendant in error, a judgment and decree was rendered against the said plaintiffs in error, and the said plaintiffs in error having obtained or being about to obtain from the Supreme Court of the United States a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph Naphtaly, defendant in error, being about to issue, citing and admonishing him to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, District of Columbia, at a time to be fixed by said court:

Now, the condition of the above obligation is such that if the said Julius A. Beley, F. Darling, and Charles Brigard shall
76 prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID P. SMITH. [SEAL.]
MARIE C. TACKLEY. [SEAL.]

Acknowledged before me the day and year first above written.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA,
Northern District of California, } ss:

David P. Smith and Marie C. Tackley, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five thousand dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

DAVID P. SMITH.
MARIE C. TACKLEY.

Subscribed and sworn to before me this 16th day of March, A. D. 1896.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

Approved:
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

Washington, D. C., March 23, 1896.

(Endorsed:) Bond on writ of error. Sufficiency of securities approved. Joseph McKenna, circuit judge. Filed March 31, 1896. F. D. Monckton, clerk.

77 United States Circuit Court of Appeals for the Ninth Circuit.

JULIUS A. BELEY, F. DARLING, and CHARLES BRIGARD,
Plaintiffs in Error,
vs.
JOSEPH NAPHTALY.
} No. 251.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing seventy-six (76) pages, numbered from one (1) to seventy-six (76), inclusive, to be a full, true, and correct copy of the printed transcript of record in the above-entitled cause and of all proceedings in our said United States circuit court of appeals, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 7th day of April, A. D. 1896.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

78 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Julius A. Beley, F. Darling, and Charles Drigard, plaintiffs in error, and Joseph Napthaly, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

79 [Endorsed:] D. No. 251. Julius A. Beley *et al. v.* Joseph Naphtaly. Writ of error. Filed March 31, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

I admit service upon me of a copy of the within citation, at San Francisco, California, this thirty-first day of March, A. D. 1896.

JOSEPH NAPHTALY,
Defendant in Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said United States circuit court of appeals, to the Supreme Court of the United States, within mentioned, at a day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

80 UNITED STATES OF AMERICA, *ss:*

To Joseph Napthaly, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein Julius A. Beley, F. Darling, and Charles Drigard are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 23d day of March, in the year of our Lord one thousand eight hundred and ni[illegible]-six.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

81 [Endorsed:] D. 251. Julius A. Beley *et al. v.* Joseph Naphtaly. Citation. Filed March 31, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

On this 31st day of March, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared H. F. Crane before me, the subscriber, F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, and makes oath that he delivered a true copy of the within citation to Joseph Naphtaly at the city and county of San Francisco, State of California, on the day and year above written.

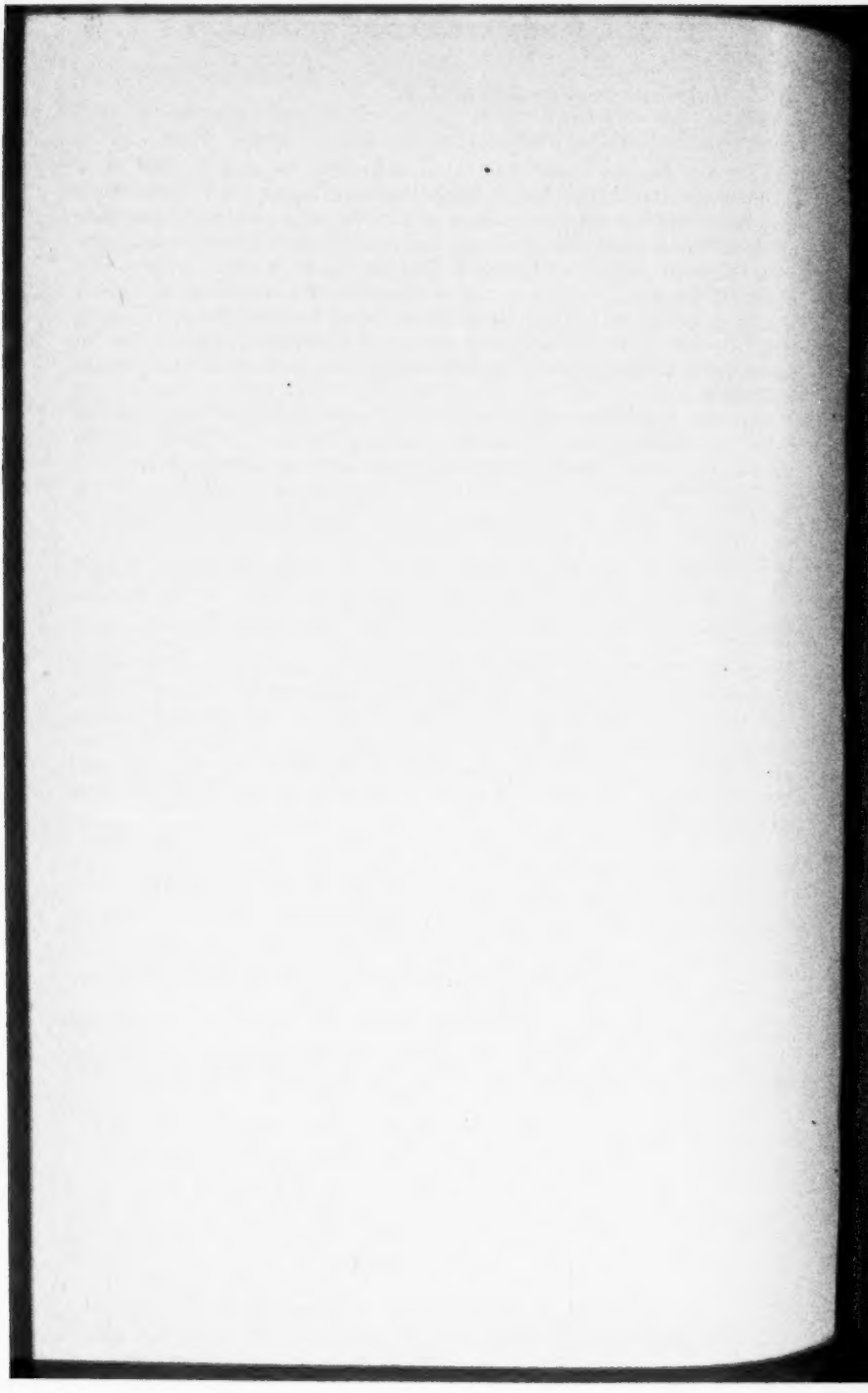
H. F. CRANE.

Sworn to and subscribed the 31st day of March, A. D. 1896.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: Case No. 16,303. U. S. circuit court of appeals, 9th circuit. Term No., 180. Julius A. Beley, F. Darling, and Charles Drigard, plaintiffs in error, *vs.* Joseph Naphtaly. Filed May 20, 1896.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 163.

JOSIAH S. SMITH, APPELLANT,

vs.

JOSEPH RAFFERTY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED MAY 26, 1898.

(16,394.)

(16,304.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 181.

JOSIAH S. SMITH, APPELLANT,

vs.

JOSEPH NAPHTALY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 24, 1897.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

JOSIAH S. SMITH, Plaintiff,
vs.
JOSEPH NAPHTALY, Defendant. } No. 11887.

Amended Complaint.

iah S. Smith, the plaintiff above named, now comes and by of court files this, his amended complaint herein, and for his of action and the relief herein prayed, avers and shows to the the following facts, viz:

I.

it he is the equitable o er and entitled to the exclusive pos- n of that certain piece and, situate, lying and being in the y of Contra Costa, State . California, designated and described northeast quarter of section ten, in township one, south of two, west of the Mount Diablo base and meridian, contain- out 160 acres of land as shown by the public surveys of said hip. That at all the times mentioned herein said land was ow is public land of the United States, and subject to pre- on, settlement and purchase under the conditions and provis- f the laws of the United States in that behalf. That the iff was, and now is, a native-born citizen of the United States, he age of twenty-one years, the head of a family, and in all things qualified to avail himself of the rights of a pre-emption settler upon the purchaser of 160 acres of the public lands of the United States under and in pursuance of the laws enacted ngress in that behalf.

II.

it the right, title and interest which the plaintiff claims in and tract of land above described, arises by virtue of and is based the following facts, to wit: that in or about the month of , 1875, the plaintiff made a settlement in person upon said which was then unsurveyed public land. That he made such ment for the sole purpose of acquiring the title thereto from nited States by pre-emption, and to make the same a home for lf and his family. That he erected a substantial dwelling- thereon in which he and his family have since resided; built and other outhouses, cultivated said land from year to year, g hay, grain and other produce thereon, planted an orchard it trees, and enclosed the land with a substantial fence, and uch improvements are of the value of two thousand dollars. in or about the month of August, 1878, the township embrac- id land having been surveyed and sectionized by the surveyor al of the United States, and a plat of said survey having been

placed on file in the United States land office at San Francisco for the land district embracing said land, and no claim other than plaintiff's for said land having been made at said office, the plaintiff did on said last-named date make and file in said land office his declaratory statement in writing, whereby he gave notice of his said
3 settlement on said land, and therein declared his intention to purchase said land from the United States under and in pursuance of the acts of Congress relative to the pre-emption and purchase of the public lands of the United States, and then and there paid to the receiver of said land office the fees and charges for such filing.

That at all times since said filing of his declaratory statement, the plaintiff has been ready, anxious and willing, and has at divers times at said land office since said last-named date, offered and demanded to be permitted to make proof of his right to purchase said land of the United States, but has at all times, and now is, hindered and prevented from so doing by the adverse and groundless claim of the defendant to said land, as is hereinafter more fully shown.

III.

And the plaintiff further charges and avers, that since in or about the year 1877, the defendant, Joseph Naphtaly, has claimed some estate or interest in the tract of land above described and upon which the plaintiff has made his settlement and improvements, as aforesaid; that such claim is adverse to the right, interest and estate of the plaintiff of, in and to said land, as hereinbefore shown, and said adverse claim has since the year 1878 hindered and prevented the plaintiff from the exercise of his right to enter said land at the land office and receive a patent therefor under the laws of the United States as a pre-emptor. That such adverse claim of the defendant is utterly groundless and is of no force or effect, either in law or equity, and this suit is brought to have such claim determined.

4 IV.

And the plaintiff further avers and charges that said adverse claim is based solely upon the assumption that some time in the year 1844 one Inocencio Romero and his brothers, Jose and Mariano Romero, obtained and received from the Mexican government a grant of a large tract of land situate in Contra Costa county, California; that a pretended partition was made of said tract by said Inocencio, Jose and Mariano Romero whereby said Inocencio Romero was awarded in severalty about three thousand acres of said tract of which the one hundred and sixty acres claimed by the plaintiff, as aforesaid, is a part, and that on, or about the 15th day of May, 1876, the defendant had become, by mesne conveyance, a purchaser of the interest of Inocencio Romero in said three thousand acres of land. That the facts concerning said Romero claim and the claim of the defendants are as follows, to wit:

That on, or about January 18th, 1844, said Romero brothers pre-

sented their joint petition to the Mexican governor at Monterey, California, praying that a grant be made to them by the governor of the tract of land before mentioned under and in pursuance of the laws and customs of the Mexican government; that, thereupon, the governor caused an order to be made to the effect that said petitioners do make and present to him a measurement and description of the land prayed for, and also appear before him and bring with them one Senor Sato, who was reputed to be in possession of and making claim to the same tract of land.

That said Romeros, the petitioners, neglected and failed to
5 comply with said order, or any part thereof, and no further proceeding was taken or act done in the premises concerning the petition by or before the governor, and no grant or semblance of a grant was ever made to said Romeros, or any person, or persons, for said land, or any part thereof, and neither of said Romeros ever had or acquired any color of right, title, estate, interest or claim of, in or to said land, or any part thereof, under said Mexican government, or from any source whatever.

V.

That notwithstanding the aforesaid facts, said Romeros did set up a claim to said land and present the same for confirmation under the act of Congress entitled "An act to ascertain and settle the private land claims in the State of California," approved March 3rd, 1851. That such proceedings were had and taken in said matter, that on the 17th day of April, 1855, the board of land commissioners created by said act found, held and decided that no grant was ever issued to any person, and no equitable right appeared on the part of any of the petitioners to a confirmation. And, on appeal, the district and Supreme Courts of the United States found, held and decided that no grant or semblance of a grant had ever been made to the Romeros, or any of them, for said land, or any part thereof (1 Hoffman, 219; 1 Wall, 721), and on that ground alone the said claim was rejected. That said decision of the Supreme Court was made at the December term of said court, 1863.

VI.

That on the 10th day of August, 1883, the defendant,
6 Joseph Naphtaly, having become in the year 1876, as aforesaid, by mesne conveyance, the grantee of said Inocencio Romero for said three thousand acres of land, made and presented at the United States land office at San Francisco, California, a petition duly verified by his oath, wherein he alleged that said three thousand acres of land, so purchased by him, was embraced by the boundaries and formed a part of a tract of land granted by the Mexican government in the year 1844, to Inocencio, Jose and Mariano Romero, and that in 1863, their claim had been rejected by the Supreme Court of the United States, and that he sought to purchase said land from the United States solely under the provisions of the 7th section of an act of Congress entitled "An act to quiet land titles

in California," approved July 23rd, 1866. That at the time the defendant purchased said interest of Inocencio Romero in 1875, and at the time he filed said petition in 1883, and for a long time prior thereto, he and his grantors had full knowledge that no grant, or semblance of a grant, had ever been made for said land. That such proceedings were afterwards had and taken upon the petition of the defendant in the Land Department of the United States and before the officers thereof that on the 2nd day of March, 1887, the Hon. Wm. A. J. Sparks, Commissioner of the General Land Office, rejected the claim of the defendant and refused to permit him to purchase said land, or any part thereof, under the 7th section of the said act of Congress of July 23rd, 1866, on the ground that said Romero never had any grant, or color of interest, right or claim to said land, and on the 4th day of February, 1889,

7 the Hon. W. F. Vilas, Secretary of the Interior of the United States, on an appeal to him, concurred with said Commissioner Sparks, and affirmed the decision made by him, as aforesaid. That in, or about the month of March, 1889, the defendant made application to the Hon. John W. Noble, then Secretary of the Interior, and the successor in office of said Hon. W. F. Vilas, for a rehearing of matters contained in said petition, and on the 23rd day of June, 1891, such rehearing was granted, and on such rehearing such proceedings were afterwards had and taken that on the 18th day of May, 1892, said Hon. John W. Noble, as Secretary of the Interior of the United States, and the successor in office of said Hon. W. F. Vilas, made an order purporting to grant to the defendant the right to purchase said three thousand acres of land under and by virtue of the 7th section of said act of Congress of July 23rd, 1866. That upon said rehearing and at the time of the granting of said order permitting said purchase, said Hon. John W. Noble had full knowledge of all the facts herein stated and that no grant, or semblance of a grant, had ever been issued by the Mexican government to said Romeros, or any of them, for said land, or any part thereof. And the plaintiff charges and avers that said Hon. John W. Noble in assuming to grant said rehearing, and in assuming to hear, try and determine the matter of said petition *de novo* and in granting the prayer of said petition after the same had been fully heard, tried and determined by his predecessors in office, acted without authority of law, and his acts in that behalf were and are void and of no effect.

8 And the plaintiff further charges and avers that in permitting the defendant to purchase said three thousand acres of the public lands of the United States, the said Secretary of the Interior acted without authority of law in this, to wit: that neither the 7th section of the said act of Congress of July 23rd, 1866, or any act of Congress, authorized said sale to be made by the Land Department of the United States, or by any officer thereof, and said land was so caused to be sold in the absence of any legislation authorizing such sale, and that such sale was, and is void and of no effect.

That under color of said order of the Hon. John W. Noble, grant-

ing the prayer of said petition of the defendant to purchase said land, as aforesaid, divers patents of the United States were caused to be issued by the officers of the Land Department of the United States, purporting to grant to the defendant said three thousand acres of land in separate tracts and parcels, one of which patents purports to grant to the defendant the one hundred and sixty acres of land first above described and upon which the plaintiff has his settlement and improvements, as before shown. That each of said patents falsely recites upon its face that it was issued by virtue of the provisions of act of Congress of the 24th of April, 1820, and the acts supplemental thereto, when in truth, and in fact each of said patents were issued under color of the sale permitted to be made by said Secretary of the Interior, as before shown, and under the pretext that such sale was authorized by the 7th section of the act of Congress entitled, "An act to quiet land titles in California," approved July 23rd, 1866, and no other act of Congress.

9 That by means of said patent the defendant makes such adverse claim, as aforesaid, to said 160 acres of land as against plaintiff, and is threatening to make use of the same in the courts, and causing the plaintiff to be dispossessed of said land and deprived of his said improvements thereon, and that by means of said sale and patent and such proceedings in said Land Departments on behalf of the defendant, the plaintiff is hindered and prevented from procuring the title of the United States to said land, under and in pursuance of the pre-emption laws of the United States, and that the plaintiff has no plain, adequate or complete remedy at law in the premises.

Wherefore, the plaintiff prays that the court adjudge and decree that the pretended sale of said 160 acres of land, described in the complaint, to defendant, and upon which the plaintiff has made his said settlement and improvements was without authority of law and void.

That the patent issued by the Land Department of the United States purporting to grant said land to the defendant is of no legal force or effect, and that the defendant has no estate, right or title to said land adverse to the plaintiff.

That the defendant be forever enjoined and restrained from setting up or asserting any right or claim to said land adversely to the plaintiff.

And that it be ordered, adjudged and decreed that as against the defendant and his heirs and assigns, that the plaintiff is en-

10 titled to the peaceable and exclusive possession of said 160 acres of land, and that the court do grant such other and further relief as may be meet and proper.

HENRY F. CRANE AND
PHILIP TEARE AND
A. C. SEARLES,
Solicitors for Plaintiff.

HENRY F. CRANE. *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
City and County of San Francisco, }

Josiah S. Smith, being duly sworn, deposes and says: that he is the plaintiff named in the foregoing amended complaint; that he has read the contents thereof; that the same is true of his own knowledge and belief, except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true.

JOSIAH S. SMITH.

Subscribed and sworn to before me this first day of May, 1895.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court,
Northern District of California.

(Endorsed:) Copy of within received this first day of May, 1895, receipt without waiving rights pl'ff may have to object to its being filed at this date. Naphtaly, Freidenrich & Ackerman, att'ys for pl'ff. Filed May 1st, 1895. W. J. Costigan, clerk.

11 In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

JOSIAH S. SMITH, Complainant, }
vs.
JOSEPH NAPHTALY, Defendant. }

Demurrer to Amended Complaint.

This defendant, Joseph Naphtaly, by protestation, not confessing all or any of the matters or things in the said complainant's bill contained to be true, in such manner and form as the same are therein set forth and alleged, does demur to said bill and for cause of demurrer shows:

I.

That the said complainant hath not by his said bill of complaint made such a case as entitles him in a court of equity to any relief from or against this defendant.

II.

That it appears upon the face of the said bill that the complainant was not and never has been in the *bona fide* actual possession of the lands and premises which constitute the subject-matter of this action or any part thereof.

And for further cause of demurrer, this defendant alleges that this court has no jurisdiction of the subject-matter of the action.

Wherefore, and for divers other good causes of demurrer
12 appearing in the said bill, this defendant doth demur thereto, and prays the judgment of this honorable court, whether he shall be compelled to make any other and further answer to the

said bill, and humbly prays to be dismissed from hence with his reasonable costs in this behalf sustained.

NAPHTALY, FREIDENRICH & ACKERMAN,
Solicitors for Defendant.

A. L. RHODES AND
CRITTENDEN THORNTON,
Of Counsel for Defendant.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

A. L. RHODES,
Counsel for Defendant.

UNITED STATES OF AMERICA,
City and County of San Francisco, } ss:

Joseph Naphtaly, the above-named defendant, being duly sworn, upon his oath doth say that the foregoing demurrer is not interposed for delay.

J. NAPHTALY.

Subscribed and sworn to before me this 8th day of May, 1895.

[SEAL.] GEO. T. KNOX,
Notary Public.

(Endorsed:) Filed May 8th, 1895. W. J. Costigan, clerk.

13 At a stated term, to wit: the July term A. D. 1895 of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 5th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge.

J. S. SMITH
vs.
JOS. NAPHTALY. } No. 11887.

Order Sustaining Demurrer and Dismissing Complaint.

The demurrer to amended bill came on regularly for hearing, H. F. Crane and Philip Teare, Esqs., appearing for plaintiff and against said demurrer, and A. L. Rhodes and C. Thornton, Esqs., appearing for said defendant and in support of said demurrer, after argument of counsel duly heard and considered, it was ordered that said demurrer be, and hereby is, sustained and bill dismissed at complainant's cost.

14 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

JOSIAH S. SMITH, Complainant,
vs.
JOSEPH NAPHTALY, Respondent. } No. 11887.

Enrollment.

The complainant filed his bill of complaint herein on the 9th day of February, 1894, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the 5th day of March, A. D. 1894, which is hereto annexed.

The respondent appeared herein on the 5th day of March, 1894, by Naphtaly, Freidenrich & Ackerman, and A. L. Rhodes and J. C. Campbell, Esqs., his solicitors.

On the 2nd day of April, 1894, an answer was filed herein, which is hereto annexed.

On the 7th day of May, 1894, a replication to the answer was filed herein, which is hereto annexed.

On the 6th day of March, 1895, a motion to amend bill of complaint was filed herein, which is hereto annexed.

On the 11th day of March, 1895, an order was made herein granting said motion to amend bill of complaint, a copy of said order being hereto annexed.

On the 11th day of March, 1895, an amended bill of complaint was filed herein, which is hereto annexed.

15 On the 12th day of March, 1895, a demurrer to the amended bill of complaint was filed herein, which is hereto annexed.

On the 22nd day of April, 1895, an order was made herein confessing the demurrer to the amended complaint, a copy of said order being hereto annexed.

On the 1st day of May, 1895, an amended complaint was filed herein, which is hereto annexed.

On the 8th day of May, 1895, a demurrer to said amended complaint was filed herein, which is hereto annexed.

On the 5th day of August, 1895, an order was made herein sustaining the demurrer to the amended complaint and dismissing the cause, a copy of said order being hereto annexed.

Thereafter a final decree was signed, filed and entered herein in the words and figures following, to wit:

16 At a stated term, to wit: the July term, A. D. 1895, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge.

JOSIAH S. SMITH, Complainant,
vs.
JOSEPH NAPHTALY, Respondent. } No. 11887.

Final Decree.

In this cause an order having been heretofore on the 5th day of August, 1895, made and entered herein sustaining the demurrer of the respondent to the amended bill of complaint of complainant and dismissing said cause at complainant's cost—

Thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the complainant's amended bill of complaint herein be, and the same hereby is dismissed, and that respondent recover his costs herein taxed at $—.

JOSEPH McKENNA,
Circuit Judge.

(Endorsed:) Filed and entered August 19, 1895. W. J. Costigan, clerk.

17 In the Circuit Court of the United States, Northern District of California.

JOSIAH S. SMITH, Plaintiff,
vs.
JOSEPH NAPHTALY, Defendant. } No. 11887.

Petition for Order Allowing Appeal.

Josiah S. Smith, the plaintiff in this suit, feeling himself aggrieved by the judgment and decree of this court entered herein on the 19th day of August, 1895, whereby it was ordered and adjudged that the demurrer of the defendant to his amended complaint herein be sustained and that said complaint be dismissed with costs—

Now comes the plaintiff by his counsel, H. F. Crane and Philip Teare, and prays said court for an order allowing him an appeal to the hon., the United States circuit court of appeals for the ninth circuit under and in accordance with the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the bond as security for costs, etc., on said appeal.

Dated August, 1895.

H. F. CRANE AND
PHILIP TEARE,
Plaintiff's Attorneys.

(Endorsed:) Filed August 21, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

18 In the Circuit Court of the United States, Northern District of California.

JOSIAH S. SMITH, Plaintiff,
vs.
JOSEPH NAPHTALY, Defendant. } No. 11887.

Plaintiff's Assignment of Errors on Appeal.

1st.

The court erred in holding and deciding that the plaintiff was not entitled to have and maintain this suit, under and by virtue of section 738 of the Code of Civil Procedure of the State of California, against one who claims an estate or interest in real property adverse to him, for the purpose of having such adverse claim determined.

2nd.

The court erred in holding and deciding that it appeared upon the face of the complaint, or at all, that the plaintiff has a plain, adequate and complete remedy at law.

3rd.

The court erred in holding and deciding that the facts set forth in the amended bill of complaint failed to show, that the patent issued by the Land Department to the plaintiff, for the land in question, was so issued without authority of law and was therefore void.

4th.

19 The court erred in holding and deciding that the plaintiff had no such interest in the land in controversy, or the subject-matter of the suit, as to entitle him to question the validity of said patent, or the acts of the officers of the Land Department of the United States in issuing or causing said patent to be issued to the defendant.

5th.

The court erred in holding and deciding that the officers of the Land Department had the sole power to adjudge and determine each and all questions relating to the legal construction of the provisions of the 7th section of the act of Congress entitled "An act to quiet land titles in California," approved July 23rd, 1866, and that their construction is final and binding on all the courts.

6th.

The court erred in holding and deciding that the Hon. John W. Noble, as Secretary of the Interior, and the successor in that office of the Hon. W. F. Vilas, had authority to order a rehearing of the defendant's application to purchase said land, and upon such re-

hearing to reverse the final decision and action of a former Secretary, and the entire former Land Department and grant said application.

7th.

The court erred in sustaining the defendant's demurrer to the amended bill of complaint and in ordering said complaint to be dismissed.

H. F. CRANE AND
PHILIP TEARE,
Pl'ff's Att'ys.

(Endorsed:) Filed August 21, 1895. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

20 At a stated term, to wit: the July term, A. D. 1895, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Wednesday, the 21st day of August, in the year of — Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge.

JOSIAH S. SMITH
vs.
JOSEPH NAPHTALY. } No. 11887.

Order Allowing an Appeal.

Upon motion of H. F. Crane, Esq., counsel for complainant, and upon filing a petition for an order allowing an appeal, and an assignment of errors, it is ordered that an appeal be, and hereby is allowed to the United States circuit court of appeals for the ninth circuit herein, from the final decree filed and entered herein August 19th, 1895, and that the amount of the bond on appeal be, and hereby is fixed at the sum of five hundred dollars.

Bond on Appeal.

Know all men by these presents, that we, Josiah S. Smith, as principal, and W. A. Rogers and D. P. Smith, as sureties, are held and firmly bound unto Joseph Naphtaly, in the full and just
21 sum of five hundred dollars, to be paid to the said Joseph Naphtaly, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a circuit court of the United States, for the northern district of California, in a suit depending in said court between Josiah S. Smith, complainant and appellant, and Joseph

Naphtaly, respondent and appellee, numbered 11887, a decree was rendered against the said appellant and the said Josiah S. Smith, having obtained from said court an order allowing an appeal, to reverse the decree in the aforesaid suit and is about to obtain a citation directed to the said Joseph Naphtaly, citing and admonishing him to be and appear at the United States circuit court of appeals for the ninth circuit, to be holden at San Francisco, in the State of California, on the 2d day of September next:

Now, the condition of the above obligation is such, that if the said Josiah S. Smith shall prosecute his said appeal to affect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSIAH S. SMITH. [SEAL.]
W. A. ROGERS. [SEAL.]
D. P. SMITH. [SEAL.]

22 Acknowledged before me the day and year first above written.

[SEAL.] J. M. STOW,
Notary Public in and for Contra Costa County, Cala.

UNITED STATES OF AMERICA,
Northern District of California, } ss:

W. A. Rogers and D. P. Smith, being duly sworn, each for himself, deposes and says, that he is a householder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

W. A. ROGERS.
D. P. SMITH.

Subscribed and sworn to before me, this 24 day of August, A. D. 1895.

[SEAL.] J. M. STOW,
Notary Public in and for the County of Contra Costa, State of California.

(Endorsed:) The sureties in the foregoing bond are in my judgment good and sufficient for the amount of such bond. Jos. P. Jones, judge. Form of bond and sufficiency of securities approved. Joseph McKenna, judge. Filed Aug. 28th, 1895. W. J. Costigan, clerk.

23 In the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

JOSIAH S. SMITH, Complainant,
vs.
JOSEPH NAPHTALY, Respondent. } No. 11887.

Certificate to Transcript.

I, W. J. Costigan, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern

district of California, do hereby certify *that* the foregoing pages, numbered from 1 to 22 inclusive, to be full, true and correct copies of the amended complaint filed May 1, 1895; demurrer, filed May 8, 1895; order of court of August 5, 1895; enrollment, final decree, petition for appeal, assignment of errors, order allowing appeal, and bond on appeal in the therein-entitled cause, as the same remain of record and on file in the office of the clerk of said court.

I further certify that the cost of the foregoing copies is $15.90, and that said amount was paid by Josiah S. Smith, appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court this 27th day of Sept., A. D. 1895.

[SEAL.] W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

24 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph Naphtaly, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 27th day of September next, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States, for the northern district of California, in that certain action numbered 11887, in which Josiah S. Smith is complainant and appellant and you are defendant and appellee to show cause, if any there be, why the decree rendered against the said appellant as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, judge of the United States circuit court, in and for the northern district of California, this 28th day of August, A. D. 1895.

JOSEPH McKENNA,
Judge of the U. S. Circuit Court, Northern District of California.

Received a copy of the within citation this twenty-eighth day of August, 1895.

J. NAPHTALY,
Defendant, in Person.

25 (Endorsed): Original. U. S. circuit court of appeals for the ninth circuit. Josiah S. Smith, appellant, *vs.* Joseph Naphtaly, appellee. Citation. Filed August 28, 1895. W. J. Costigan, clerk U. S. circuit court, northern district of California, by W. B. Beaizley, deputy clerk.

(Endorsed): No. 262. United States circuit court of appeals for the ninth circuit. Josiah S. Smith, appellant, *vs.* Joseph Naphtaly, appellee. Transcript of record. Appeal from the circuit court of the United States for the northern district of California. Filed September 27, 1895. F. D. Monckton, clerk.

26 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY *et al.*, Appellees.

Appeal from the circuit court of the United States for the northern district of California.

Before Gilbert and Ross, circuit judges, and Morrow, district judge.

Ross, circuit judge, delivered the opinion of the court:

From the action of the court below in sustaining a demurrer to the bill in this case the complainant appealed. The merits of the case are covered by the decision in the case of Beley *et als. vs.* Naphtaly, just filed. It is not necessary to do more than to refer to the reasons there given in support of our judgment affirming that of the court below.

Judgment affirmed.

(Endorsed): Opinion. Filed Feb. 3, 1896. F. D. Monckton, clerk.

27 United States Circuit Court of Appeals for the Ninth Circuit.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY. } No. 262.

Appeal from the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Decree. Filed Feb. 3, 1896. F. D. Monckton, clerk.

28 At a stated term, to wit, the October term, A. D. 1895, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the sixth day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Joseph McKenna, circuit judge; Honorable William W. Morrow, district judge.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY. } No. 262.

On motion of H. F. Crane, Esquire, counsel for the appellant, Crittenden Thornton, Esquire, counsel for the appellee, consenting,

it is ordered that an appeal to the Supreme Court of the United States herein be, and the same is hereby, allowed.

On like motion and consent it is further ordered that the amount of the bond for costs on appeal to said Supreme Court be, and the same is hereby, fixed at the sum of five hundred dollars.

29 United States Circuit Court of Appeals for the Ninth Circuit.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY, Appellee. } No. 262.

Assignments of Error in Supreme Court.

1st. The court erred in holding that the appellant as against the appellee was and is a naked trespasser on the land because it did not appear that the appellant had connected himself with any title from the United States thereto.

2nd. The court erred in holding that because the appellant was unable to connect himself with the title of the United States he could not be permitted to show that the patents mentioned in the bill were issued without authority of law and were therefore void.

3rd. The court erred in holding that after the Commissioner of the General Land Office and the Secretary of the Interior had heard, tried, and finally determined the right of the appellee to purchase said land under the 7th section of the act of July 23rd, 1866, that such determination was not final, and that a succeeding Secretary had the power and right to reopen said matter and permit such purchase by the appellee under said act after it had been rejected by said former determination.

4th. The court erred in assuming that said 3,000 acres of land or any part thereof had ever been enclosed in any manner or ever had any ascertained boundary lines or any boundaries whatever.

30 5th. The court erred in assuming and holding that the right conferred by section 7, act of July 23d, 1866, could not be made available until the United States public surveys had been made and run on said land.

6th. The court erred in assuming and holding that S. P. Millett was in October, 1859, or at any time a purchaser of said land in good faith under said statute or for a valuable consideration or was such a purchaser as is contemplated by said statute and that he became entitled to make such purchase thereunder.

7th. The court erred in holding that the appellee, by becoming a remote purchaser of an indefinite and undescribed tract of public land in May, 1876, from said Millett by simple mesne conveyance, thereby acquired a right in 1883 to cause 3,000 acres of the public land in Contra Costa county, California, to be surveyed and platted and to purchase the same from the United States.

8th. The court erred in holding that the appellee was a person who had in good faith and for a valuable consideration purchased

said land of a Mexican grantee or assigns, which grant had subsequently been rejected, and had used, improved, and continued in the actual possession of the same according to the lines of his original purchase.

9th. The court erred in holding in effect that the decision of Secretary Noble in allowing and permitting such purchase by the appellee was and is conclusive upon the appellant upon all questions of law and fact.

10th. The court erred in holding said sale and the patents issued to the appellee in pursuance thereof to be legal and valid and to pass the title of said land to the appellee and erred in sustaining the demurrer to the bill and dismissing the same.

31 Wherefore appellant prays that the decree of the U. S. circuit court of appeals be reversed and the cause be remanded with direction that the demurrer be overruled and a new trial ordered in the circuit court.

H. F. CRANE,
Of Counsel for Appellant.

(Endorsed:) Assignment of errors. Filed May 8th, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

32 Know all men by these presents that we, Josiah S. Smith, as principal, and David P. Smith and Marie C. Tackley, as sureties, are held and firmly bound unto Joseph Naphtaly in the full and just sum of five hundred dollars, to be paid to the said Joseph Naphtaly, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a session of the United States circuit court of appeals for the ninth circuit, in a suit depending in said court between Josiah S. Smith, appellant, and Joseph Naphtaly, appellee, a decree was rendered against the said appellant, and the said appellant having obtained from said court an order allowing an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Joseph Naphtaly, citing and admonishing him to be and appear at the United States Supreme Court to be holden at the city of Washington, District of Columbia, within sixty days from the date hereof, being about to issue:

Now, the condition of the above obligation is such that if the said Josiah S. Smith shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

D. P. SMITH. [SEAL.]
MARIE C. TACKLEY. [SEAL.]

Acknowledged before me the day and year first above written.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

33 UNITED STATES OF AMERICA, }
Northern District of California, } *ss:*

David P. Smith and Marie C. Tackley, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

D. P. SMITH.
MARIE C. TACKLEY.

Subscribed and sworn to before me this 21st day of April, A. D. 1896.

F. D. MONCKTON,
Commissioner of U. S. Circuit Court,
Northern District of California.

(Endorsed:) Bond on appeal. Form of bond and sufficiency of securities approved. Joseph McKenna, judge. Filed April 21, 1896. F. D. Monckton, clerk.

34 United States Circuit Court of Appeals for the Ninth Circuit.

JOSIAH S. SMITH, Appellant,
vs.
JOSEPH NAPHTALY, Appellee. } No. 262.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing thirty-two pages, numbered from one to thirty-two, both inclusive, to be a full, true, and correct copy of the printed transcript of record and of all proceedings in our said United States circuit court of appeals, and that the same together constitute the entire transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 9th day of May, A. D. 1896.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph Naphtaly, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Supreme Court, to be holden at the city of Washington, District of Columbia, within sixty days from the date hereof, pursuant to an order allowing an appeal entered in the

clerk's office of the United States circuit court of appeals for the ninth circuit, wherein Josiah S. Smith is appellant and you are appellee, and to show cause, if any there be, why the decree rendered against the said Josiah S. Smith, as in the said *decree* mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, judge of the United States circuit court in & for the northern district of California, 9th circuit, this 22d day of April, A. D. 1896.

JOSEPH McKENNA,
U. S. Circuit Judge, 9th Circuit.

36 [Endorsed:] Dock. —, No. 262. U. S. circuit court of appeals for the ninth circuit. Josiah S. Smith, appellant, *vs.* Joseph Naphtaly, appellee. Citation. Filed April 22, 1896. F. D. Monckton, clerk.

On the 22d day of April, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared before me, the undersigned, W. J. Costigan, Philip Pease, the subscriber, and makes oath that he delivered a true copy of the within citation to Joseph Naphtaly, appellee, on the 22d of April, A. D. 1896.

PHILIP PEASE.

Sworn to and subscribed the 22d day of April, A. D. 1896.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

Endorsed on cover: Case No. 16,304. U. S. circuit court of appeals, 9th circuit. Term No., 181. Josiah S. Smith, appellant, *vs.* Joseph Naphtaly, Filed May 20, 1896.